Supreme Court, U.S.
FILE

97 • 514 SEP 18 1997

No. —OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

THE CADLE COMPANY,

Petitioner,

v.

AMELIA P. JOHNSON,

Respondent.

On Petition For A Writ Of Certiorari To The Alabama Court Of Civil Appeals

PETITION FOR A WRIT OF CERTIORARI

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51 pp
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QUESTIONS PRESENTED

The FDIC, as corporate successor to the bank, transferred a package of assets to Cadle, including three original, uncanceled notes, signed by Johnson. The FDIC specifically endorsed each note to Cadle, which brought suit against Johnson on the three notes. In defense, Johnson claimed her notes had been renewed by a third party, and that she was thereby discharged; however, Johnson's original, uncanceled notes, remained in the bank file. The trial court refused to apply federal law asserted by Cadle. Instead, the court allowed evidence of the renewal and held that it was for a jury to decide whether renewal of her notes constituted discharge. The questions presented are:

1. Whether *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942), and the ensuing federal *D'Oench* Doctrine, which precludes a debtor from asserting defenses against the FDIC where the debtor lends himself to a scheme or arrangement whereby the banking authority or insuring entity is likely to be misled, precludes a "discharge by renewal" defense, under these facts.

2. Whether 12 U.S.C. 1823(e), which protects the FDIC, by restricting the enforceability of any agreement tending to diminish or defeat the interest of the FDIC in any bank asset, unless the agreement meets certain statutory prerequisites (writing, execution, timing, board approval, and recording), precludes a "discharge by renewal" defense where the statutory prerequisites are not met.

QUESTIONS PRESENTED – Continued

3. Whether *Langley v. FDIC*, 484 U.S. 86 (1987), which case expanded the breadth of 12 U.S.C. 1823(e) by defining "agreement" under that statute to include conditions to the payment of a note, precludes a "discharge by renewal" defense.

4. Whether the federal holder in due course status afforded by *FDIC v. McCullough*, 911 F.2d 592 (CA11 1990), and other federal cases, precludes a "discharge by renewal" defense, under these facts.

LIST OF PARTIES AND CORPORATE STATEMENT

All parties appear in the caption of the case on the cover page.

Petitioner, The Cadle Company, is a corporation which is neither a parent nor subsidiary of any other corporation.

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OPINIONS BELOW

No court reviewing this case has issued a written opinion. The highest state court to review the merits of this case was the Alabama Court of Civil Appeals, which on August 16, 1996, issued an order affirming, without opinion, the trial court judgment. App. A1.

The Alabama Supreme Court did not review the merits of this case. A petition for writ of certiorari to the Alabama Supreme Court from the decision of the Alabama Court of Civil Appeals was timely filed, and was denied on June 20, 1997. App. C3.

JURISDICTION

The FDIC, as corporate successor to the bank, transferred a package of assets to Cadle, including three original, uncanceled notes, signed by Johnson. Cadle brought suit in state court in Alabama against Johnson on the notes, each of which was specifically endorsed by the FDIC, as corporate successor to the bank.

Prior to trial, Cadle asserted in its summary judgment motion, that the federal law here presented, entitled Cadle to judgment, as a matter of law. App. G8-23. The trial court denied the summary judgment motion. App. E6. Final judgment was subsequently rendered against Cadle, App. F7, despite Cadle's continuing assertion of the protection of the federal authority raised here.

Appeal was taken to the Alabama Court of Civil Appeals. All federal rules of law presented in this

petition were asserted in the appeal in support of this position.

The Alabama Court of Civil Appeals on August 16, 1996, issued an order affirming, without opinion, the trial court judgment. App. A1. Application for rehearing in the Alabama Court of Civil Appeals was overruled, without opinion on September 27, 1996. App. B2. The Alabama Supreme Court, on June 20, 1997, denied Cadle's petition for writ of certiorari. App. C3.

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(a), which states in relevant part, "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari . . . where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States."

STATUTORY PROVISION INVOLVED

Section 13(e) of the Federal Deposit Insurance Act, codified as 12 U.S.C. Sec. 1823(e):

"Agreements against interests of Corporation.

(1) In general. No agreement which tends to diminish or defeat the interest of the Corporation in any asset acquired by it under this section or section 11 [12 U.S.C. Sec. 1821], either as security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the Corporation unless such agreement –

(A) is in writing,

(B) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,

(C) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and

(D) has been, continuously, from the time of its execution, an official record of the depository institution."

STATEMENT OF THE CASE

In 1984, the Respondent, Amelia P. Johnson (hereinafter "Johnson"), as co-maker with her husband, jointly executed three promissory notes payable to the First State Bank of Atmore (hereinafter "bank"). App. J42-47. In 1987, the Federal Deposit Insurance Corporation (hereinafter "FDIC"), which insured the deposits of the bank, took control of the bank. At that time, the three original notes signed by Johnson were all in the bank file.

In 1990, The FDIC, in its corporate capacity as successor in interest to the bank, transferred all of the notes to Petitioner, The Cadle Company (hereinafter "Cadle"). The original notes were mailed to Cadle by the FDIC together with a general assignment. The FDIC later specifically endorsed Johnson's three original notes on the reverse as follows: "PAY TO THE ORDER OF *THE*

CADLE COMPANY Without Recourse By: */s/ Richard J. O'Brien* Attorney-In-Fact for Federal Deposit Insurance Corporation in its Corporate capacity as successor in interest to *FIRST STATE BANK OF ATMORE.*" Prior to Cadle's acquisition of the notes, Johnson's husband declared bankruptcy.

As the FDIC's assignee and as holder of the three original, uncanceled notes signed by Amelia P. Johnson, Cadle filed suit against her to collect the amount still owing on the notes. Prior to trial, Cadle filed a motion for summary judgment, based on Cadle's possession of the three original notes (each bearing the endorsement from the FDIC), Johnson's admission that she signed them, and the lack of evidence of discharge.

In its brief in support of summary judgment, Cadle asserted that, as assignee of the federal insurer of the bank, Cadle was entitled to the benefit of the protections afforded to the FDIC by federal law. Specifically, Cadle asserted the following federal statutes and authority:

1) **The *D'Oench* doctrine**, emanating from *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942), which precludes defenses in situations where the maker of a note lends herself to a scheme or arrangement whereby bank examiners are likely to be misled; and

2) **12 U.S.C. 1823(e)**, which precludes defenses asserted by the maker of a promissory note held by the FDIC, except to the extent that such defense is established by a written "agreement," signed by the debtor and the bank contemporaneously with the bank's acquisition of the asset. Furthermore, the agreement establishing the defense must be recorded in the minutes of the bank's

board of directors or loan committee, and must be at all times an official record of the bank; and

3) ***Langley v. FDIC,*** 484 U.S. 86 (1987), which case extended the application of 12 U.S.C. 1823(e), by expanding the meaning of the term "agreement," and by extending the protection of 12 U.S.C. 1823(e) to the FDIC, regardless of whether the FDIC had knowledge of the "agreement"; and

4) **The federal holder-in-due-course doctrine**, defined in numerous federal opinions including *FDIC v. McCullough,* 911 F.2d 593 (CA11 1990). Cadle argued that federal law gives the FDIC the status of holder in due course when, as here, as part of a purchase and assumption transaction, it acquires a note in good faith, for value, and without actual knowledge of any defense against the note. *FDIC v. Wood,* 758 F.2d 156, 161 (CA6), *cert. denied,* 474 U.S. 944 (1985).

Johnson argued, in defense of summary judgment, that after her three notes were executed, her husband executed one or more additional notes which renewed her notes and thereby discharged her obligation of them. Based on the federal authority raised in this petition, Cadle challenged the admissibility of evidence of the renewal notes. Cadle asserted that the defense of discharge by renewal was precluded as a "scheme or arrangement likely to mislead bank examiners" under *D'Oench.* This defense, Cadle asserted, was precluded as a matter of law, without an "agreement" conforming to 1823(e) and Langley. Cadle also argued that Johnson's claim that the purported renewal constituted payment was a personal defense, which could not be asserted

against Cadle because Cadle acquired, by assignment, the FDIC's holder in due course status.

Despite the federal law asserted by Cadle, the court denied Cadle's summary judgment motion without stating any rationale. Cadle reasserted these arguments in a motion to reconsider ruling on summary judgment, on motion for directed verdict, on motion for new trial and for judgment notwithstanding the verdict. All post-trial motions were denied without written opinion. App. E6. Cadle then filed appeal to the Alabama Court of Civil Appeals, challenging the trial court's denial of Cadle's motion for summary judgment prior to trial on the basis of the federal authority raised in this petition. On August 16, 1996, the Alabama Court of Civil Appeals affirmed, without opinion, the final judgment of the trial court, App. A1. Cadle filed an application for rehearing, App. I28-41, which, on September 27, 1996, was overruled, without opinion. App. B2.

Cadle petitioned the Alabama Supreme Court for writ of certiorari, to review the decision of the Alabama Court of Civil Appeals. That petition was overruled on June 20, 1997. App. C3. Cadle now petitions The Supreme Court of the United States for writ of certiorari to review the decision of the Alabama Court of Civil Appeals.

REASONS FOR GRANTING THE PETITION

I. Interpretation of the *D'Oench* doctrine is vital to the health of the nation's banking system.

The questions addressed by this petition lie at the heart of federal banking oversight. Prior rulings of this court gave clear and important protections to federal insurers, enabling them to both oversee, and efficiently liquidate failing and failed banks. *D'Oench, Duhme and Co. v. FDIC*, 315 U.S. 447 (1942); *Langley v. FDIC*, 484 U.S. 86, 91-92 (1987). However, in recent years, these protections have been eroded by the opposition of many state and federal courts which fail to recognize the critical importance of the *D'Oench* doctrine and 12 U.S.C. 1823(e) to a financially sound federal deposit insurance program.[1]

In *D'Oench*, the Supreme Court determined that secret side agreements that were not recorded in the records of an insured depository institution should not be enforceable against Federal banking agencies when those agencies acquired assets following the failure of the institution. The Supreme Court based its holding (now referred to as the "*D'Oench* doctrine") on its power to develop federal common law. *D'Oench*, 315 U.S. at 472. In 1950, the Congress supplemented the *D'Oench* doctrine by amending section 13(e) of the Federal Deposit Insurance Act, codified as 12 U.S.C. 1823(e), to invalidate agreements relating to assets acquired by federal banking

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[1] This opposition has also led to proposals for legislative reform as outlined below, *infra* n.10.

agencies that were not recorded in official bank records. See text above at pp. 2-3.

The United States Supreme Court revisited *D'Oench* in 1987 in *Langley v. FDIC*, 484 U.S. 86 (1987). The unanimous Court expressed an expansive view toward the application of 1823(e) by broadly defining the term "agreement" as set forth in 1823(e), and declaring irrelevant to the statute's application, the FDIC's knowledge of such agreements. The Court viewed this interpretation of 1823(e) as necessary to allow federal and state examiners to rely on the bank's records because most failed bank liquidations are conducted overnight. The Court also viewed this broad application of 1823(e) as necessary to ensure mature consideration of all unusual transactions by senior bank officials, and to prevent fraud and collusion between a borrower and a failing bank. *Langley*, 484 U.S. at 93-97.

Langley, therefore, has allowed courts to apply 1823(e) as a strict liability statute without *D'Oench's* equitable underpinnings. Even private parties who purchase assets from the FDIC, now can take advantage of *D'Oench* and 1823(e). In its effort to carry out its statutory duties, the FDIC regularly sells large loan packages at public auction,[2] passing the often difficult and expensive task of collection litigation to the private sector. As the FDIC's

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[2] Public auctions for liquidation of FDIC assets are now advertised on the FDIC internet homepage at [http://www.fdic.gov]. For a description of the nine asset packages scheduled for auction on September 30, 1997 (carrying a combined book value of $19,885,057.00), see [http://www.fdic.gov/assets/nascloan.cfm].

transferees, private banking and liquidation companies obtain the benefit of *D'Oench* and 1823(e) in litigating their claims against debtors. *See, Porras v. Petroplex Sav. Ass'n*, 903 F.2d 379, 381 (CA5 1990), holding that claims and defenses barred as to FSLIC by *D'Oench* and 1823(e) are also barred as to a private party who purchased assets of the failed institution from the receiver.

Sound policy reasons support the application of *D'Oench* and 1823(e) to private FDIC assignees. Otherwise, the value of these assets would plummet, because the purchaser would assume the risks associated with alleged secret agreements and misrepresentations of the failed bank. The public policies achieved by using *D'Oench* lie at the core of the ability of the FDIC and other bank regulators effectively to supervise open banks and to resolve the failures of failing banks. The ability to rely upon the records of a failed bank in order to evaluate its assets and liabilities is essential to protect the deposit insurance funds and the public interest in a sound banking system.

In just twelve years, from 1982 through 1994, there were 1485 commercial bank failures in America.[3] The federal government, principally through the FDIC, was left to bear the costs of the bailout of these institutions. That burden eventually fell, and continues to fall, on U.S. taxpayers.

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[3] Symons, Edward L. Jr. & James J. White, *Banking Law: Teaching Materials* 547 (3d ed. 1991); *See* Macey, Jonathan R. & Geoffrey P. Miller, *Banking Law and Regulation* 628 (1992); *See California State Banking Department*, 85th Ann. Rep. 8 (1994).

The great number of failed institutions in the 1980's and early 1990's, drained the insurance funds of the various federal insurers. By 1991, the FDIC had exhausted its entire bank insurance fund and had to request $70 billion from Congress to replenish it.[4] Meanwhile, the RTC petitioned Congress for an additional $80 billion in funding to assist with the S&L bailout.[5] U.S. citizens will continue to be affected, for even though the immediate crisis appears to be over, it will take many years before the debts are completely paid. Estimates of the cost of the federal bailout reach as high as $500 billion over the next few years, and more than $1 trillion over the next several decades.[6]

Federal insurers have greatly reduced the cost to the public of these bank failures by their use of *D'Oench* and 1823(e). According to former U.S. Senator William S. Cohen, they invoked these protections 5,145 times from 1989 to 1995.[7] An FDIC representative testifying before

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[4] *See* Labaton, Stephen, *U.S. Seeks Much Bigger Amount to Shore Up Bank Deposit Fund*, N.Y. Times, Mar. 22, 1991, at A1 (describing the FDIC's request for additional funding).

[5] *Semi-Annual Report of the Resolution Trust Corporation, 1991: Hearing Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 102d Cong., 1st Sess. 18-95 (1991) (statement of Nicholas Brady, Secretary of the Treasury).

[6] Day, Kathleen, *S&L Hell: The People and Politics Behind the $1 Trillion Savings and Loan Scandal* 9 (1993).

[7] *The D'Oench Duhme Reform Act: Hearings Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 104th Cong., 1st. Sess. 2 (1995) (statement of Sen. William S. Cohen (R-Maine)).

Congress, stated, "[a] very rough estimate of the exposure which the FDIC has avoided through the use of *D'Oench* and . . . 1823(e) in just the last two years [1994-1995] is more than $1 billion in claims and counterclaims."[8]

Despite the crisis brought on by the great number of bank failures and the well documented savings to the government by the application of *D'Oench* and 1823(e), this federal law has come under fire. One critic recently noted: "Although *D'Oench* and 1823(e) originally rested on legitimate equitable concerns, the courts and Congress have extended the doctrine's scope to the point that it now gives the FDIC a powerful and often unjust litigation weapon to bar most claims and defenses of borrowers and creditors of failed financial institutions. The FDIC's use of *D'Oench* has become an excess of the banking industry."[9]

In the absence of Congressional reform[10] to clarify the many divergent applications of *D'Oench* and 1823(e),

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[8] *See Oversight of the FDIC and the RTC's Use of D'Oench Duhme: Hearings Before the Subcommittee on Oversight of Government Management and the District of Columbia of the Committee on Government Affairs*, 104th Cong., 1st Sess. 141, 161 (1995) (statement of John F. Bovenzi, Director, Division of Depositor and Asset Services, FDIC).

[9] Galves, Fred, *Might Does Not Make Right: The Call for Reform of the Federal Government's D'Oench, Duhme and 12 U.S.C. 1823(e) Superpowers in Failed Bank Litigation*, 80 Minn. L. Rev. 1323, 1411-1412 (1996).

[10] On March 30, 1995, Senator William S. Cohen, a member of the Senate Subcommittee on Oversight of Government Management, introduced S. 648, called the D'Oench Duhme Reform Act. 104th Cong., 1st Sess. (1995). The bill was referred

the United States Supreme Court should grant certiorari in this case. Without further interpretation by this Court of *D'Oench* and 1823(e), court's across the country will drift further apart in their application of these important legal principles. This will be especially true, as courts continue to feel the pressure of public opinion which, in a new era of relative health in the banking industry, views *D'Oench* and 1823(e) as unnecessary government intrusion, rather than as protection of the banking system and the taxpayer.

This Court last addressed this issue in *Langley*, ten years ago. The divergence of the federal courts in their interpretation of various provisions of this law, cries again for clarification by our nation's final interpreter of federal law. The case at bar presents an opportunity for this Court to narrow the scope of the *D'Oench* doctrine, or to reaffirm its essential purpose and importance to the government's role in the banking industry.

II. The federal questions were properly raised below.

The federal questions here presented were raised at every opportunity in the procedural history of this case. See Statement of the Case, infra at pp. 3-6.

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to the Committee on Banking. The Senate held one hearing on the bill on June 14, 1995, but took no floor action. John F. Bovenzi's testimony that *D'Oench* & 1823(e) saved the government $1 billion in 2 years, *see infra*, n.8, may have effectively killed the Congressional reform effort.

III. The state court judgment cannot be sustained on any non-federal basis.

On appeal, Cadle challenged the trial judge's pre-trial denial of summary judgment, contending that the *D'Oench* doctrine, 1823(e), and the federal common law derived holder in due course rule, each of which inure to the protection of Cadle, entitled Cadle to judgment on Johnson's three notes, as a matter of law. Johnson's sole defense was that her obligation on the notes was discharged when her husband later executed one or more additional notes, the proceeds of which, she asserted, were applied by the bank to her loan account, reducing her balance to zero, and thereby discharging her. If, as Cadle contends, these federal laws preclude Johnson's defense to liability on the notes, the state court judgment cannot be sustained on the basis of any applicable state law. If *D'Oench* and 1823(e) apply, they pre-empt any defense Johnson might otherwise be able to assert under state law. Simply put, the federal issue is the controlling issue in the case.

IV. Federal Circuits are in sharp conflict over how to apply 1823(e) and *D'Oench*.

A. The Writing Requirement. Despite this Court's clarifications in *Langley, supra*, courts applying *D'Oench* and 1823(e) since 1987, continue to express fundamental differences over the application of these laws. One example is the way in which different courts have analyzed the writing requirement of 1823(e)(1).

In *Twin Constr., Inc. v. Boca Raton, Inc.*, 925 F.2d 378 (CA11 1991), the Eleventh Circuit held that a written document that states the terms of the agreement and is kept in the lender's files is insufficient to satisfy the writing requirement unless it is formally executed by the parties. *Twin Constr.*, 925 F.2d at 383-84. The Eleventh Circuit is not alone in its strict application of 1823(e). In *Franklin Asaph Ltd. Partnership v. FDIC*, 794 F. Supp. 402, 408 (D.D.C. 1992), the District Court for the District of Columbia held that evidence of an unexecuted agreement found on the bank's books, along with documents reflecting loan committee approval of the agreement, did not meet the statutory requirements for a writing under 1823(e).

The Fifth Circuit has taken a broader approach in determining what may serve as evidence of the existence of an agreement. That circuit allows borrowers to introduce a series of documents that make reference to an alleged agreement to prove the existence of a written agreement if the documents are signed and kept in the bank records. *See Bank One Texas Nat'l Ass'n v. Morrison*, 26 F.3d 544, 548 (CA5 1994). In reaching this conclusion, the Fifth Circuit applied basic contract law principles and held that multiple documents, when read as a whole, could prove that a sufficient written agreement existed between the parties.[11]

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[11] In the *Bank One Texas* case, the 5th Circuit held that loan applications, supporting bank documents, and banks' own internal memoranda are relevant to determine parties' intent with respect to a loan guarantee. *Bank One Texas*, 26 F.3d at 548. *See also Beighley v. FDIC*, 868 F.2d 776, 782-83 (CA5 1989)

As the preceding discussion highlights, the Fifth and Eleventh Circuits disagree as to what satisfies the writing requirement. Regulators would prefer the Eleventh Circuit's approach, which simplifies and hastens the task of examining the bank records. Borrowers, in contrast, would prefer the Fifth Circuit's more relaxed and open approach. In either event, the existing uncertainty over how to prove that there is a written and executed side agreement makes it difficult for borrowers to know what is required to memorialize legitimate side agreements, and even more difficult for litigants to receive equal treatment in the various courts of our land.

The facts in the case at bar give this Court opportunity to address directly the differing views on the writing requirement of 1823(e)(1). In the present case, the trial court opened the door wider even than the Fifth Circuit, by allowing (a) evidence of purported renewal notes signed by Johnson's husband; (b) Johnson's own testimony as a former bank employee as to the meaning of certain markings on her husband's notes; (c) evidence of bank credit and debit memos (the source of which was contested – they were allegedly subpoenaed from the FDIC after Cadle filed suit); and (d) the testimony of a bank officer as to the meaning of the bank's credit and debit memos. Cadle argued that all of this evidence was precluded by *D'Oench* and 1823(e), a position consistent with the Eleventh Circuit position summarized above.

(allowing appellants to introduce 71 documents to prove that a writing existed).

App. G8-23. Implicit in the trial court's denial of summary judgment was the rejection of Cadle's federal preclusion argument.

B. The Contemporaneous Requirement. Federal Circuit Courts are also sharply divided on how to interpret and apply the contemporaneous requirement of 1823(e)(2). Under this section, an agreement not executed by the bank "contemporaneously with the acquisition of the asset" by that bank cannot serve to defeat the FDIC's interest in the asset.

The First Circuit has adopted a strict definition of contemporaneous. *See*, e.g., *FDIC v. P.L.M. Int'l, Inc.*, 834 F.2d 248, 253 (CA1 1987) (release agreement dated April 17, 1983, was not executed contemporaneously with the letter of guaranty dated December 31, 1981). A similar result was reached in *FDIC v. Virginia Crossings Partnership*, 909 F.2d 306 (CA8 1990), where, despite the execution of a letter memorializing the terms of an agreement between the bank and two guarantors calling for future reductions in the guarantors' liability, the court found that this letter was not executed contemporaneously with the making of the note, and therefore was unenforceable under 1823(e). *Virginia Crossings*, 909 F.2d at 309.

A federal district court in Texas asserted that a strict reading of the word "contemporaneous" would be contrary to general business practice and common sense, but nonetheless held that loan commitment letters given months after an asset is acquired by the bank does not satisfy 1823(e)(2). The Texas court declared, "the wisdom of an act of Congress is an issue we do not consider." *RTC v. Crow*, 763 F. Supp. 887, 893-95 (N.D. Tex. 1991) at 894

n.6, *quoting dicta in FDIC v. Manatt*, 922 F.2d 486, 490 (CA8 1991) (Gibson, J., concurring).

The Ninth Circuit has adopted a very different rule. In *RTC v. Midwest Fed. Sav. Bank of Minot*, 4 F.3d 1490 (CA9 1993), the Ninth Circuit held that in the context of a large real estate loan, "contemporaneous" may mean up to several months. *Minot*, 4 F.3d at 1500-01. The Court explained, "the contemporaneousness requirement should be considered in light of commercial reality. General business practice requires more leniency than a few days when dealing with loans of this magnitude. . . . [W]e conclude the commitment letter was contemporaneous with the preparation of the final loan documents in the sense that it takes several months to put together loans of this nature." *Minot*, 4 F.3d at 1501.[12]

In view of the conflict many courts see between the contemporaneous requirement and "commercial reality," it is likely that Courts will continue to rationalize a variety of departures from the plain language of 1823(e)(2). The disparate treatment of litigants in the various Circuits makes this issue ripe for consideration by the Supreme Court of the United States. Clarification of the contemporaneous requirement is necessary so that federal law will be applied uniformly to litigants in all courts in the land.

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[12] See also *Erbafina v. FDIC*, 855 F. Supp. 9, 12 (D. Mass. 1994) (finding that the execution of a loan commitment letter two days before the promissory note met the contemporaneous requirement).

The case at bar presents an excellent opportunity for this Court to address the contemporaneous issue. It is a "commercial reality" that renewal notes are not executed contemporaneously with the notes they renew. Therefore, by granting certiorari in this case, this Court would be in a position to adopt a uniform "commercial reality" exception to the contemporaneous requirement of 1823(e)(2), or to affirm a strict interpretation of "contemporaneous" consistent with the plain language of the statute.[13]

V. The federal holder in due course rule is not being uniformly applied.

In *FDIC v. McCullough*, 911 F.2d 593 (CA11 1990), the Eleventh Circuit adopted a holder in due course rule (hereinafter "HIDC rule") for the FDIC, observing that the Fifth, Sixth and Eighth Circuits had adopted such a rule under federal common law. Several circuits have concluded that the FDIC and the FSLIC, regardless of whether operating in a corporate or receiver capacity, are clothed under federal common law with the same

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[13] Petitioner would support a strict interpretation. The "commercial reality" rationale overlooks an obvious solution to the logical impossibility of contemporaneous execution of documents creating an obligation, and documents changing or discharging that obligation. It is the presence of the documents in the loan files of the bank which leads to what often seems to be harsh results. This is not hard to solve by simply removing the documents which demonstrate the original or prior obligation, and substituting therefor the new documents, e.g., marking the old notes canceled or paid, and removing them from the file, and replacing them with new notes or other documents evidencing the new agreement.

defenses that would be accorded a holder in due course under state law. See, e.g., *Campbell Leasing, Inc. v. FDIC*, 901 F.2d 1244 (CA5 1990); *Firstsouth, F.A. v. Aqua Constr., Inc.*, 858 F.2d 441, 443 (CA8 1988); *FSLIC v. Murray*, 853 F.2d 1251, 1256-57 (CA5 1988); *FDIC v. Wood*, 758 F.2d 156, 159 (CA6), *cert. denied*, 474 U.S. 944 (1985).

Because the FDIC acquires its assets through bulk transfers, the FDIC cannot be considered a holder in due course under state law. Section 7-3-302, Code of Alabama, 1975. This fact, however is inconsequential to the determination that the FDIC should be treated as a holder in due course, under federal common law. *Campbell Leasing*, 901 F.2d at 1249. *See also, Gunter v. Hutcheson*, 674 F.2d 862, 873 (CA11), *cert. denied*, 459 U.S. 826 (1982) (determining that as a matter of common law the FDIC had a complete defense to state and common law fraud claims if the FDIC otherwise acquired the note in good faith).

However, other courts have rejected such a rule or greatly restricted its application.[14] Even where the HIDC rule has been adopted, its application has been less than uniform.[15]

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[14] *FSLIC v. Hsi*, 657 F. Supp. 1333 (E.D. La. 1986); *FDIC v. Rockelman*, 460 F. Supp. 999 (E.D. Wis. 1978); *FDIC v. Vestring*, 620 F. Supp. 1271 (D.C. Kan. 1985).

[15] *See RTC v. Oaks Apartments Joint Venture*, 966 F.2d 995, 1001-02 (CA5 1992) (holding that a $2 million debt "or so much thereof as may be advanced" was not a sum certain, making the note non-negotiable and therefore making the HIDC doctrine inapplicable to the RTC); *Desmond v. FDIC*, 798 F. Supp. 829, 839-41 (D. Mass. 1992) (finding that a variable interest rate note was not negotiable so the FDIC did not qualify as an HIDC).

The case at bar is ideally suited for allowing this Court to address the HIDC issue. Johnson's defense of payment is a personal defense, which is not effective against a holder in due course, unless the holder had notice of the payment when it took the instrument.[16] In this case, Johnson asserted that the bank's credit and debit memos (the source of which was disputed) showed that the FDIC had knowledge of the payment defense. However, the three notes signed by Johnson were in the bank file when it was acquired by the FDIC. The FDIC's endorsement of the notes to Cadle indicates that the FDIC believed the notes were genuine and collectible, and belies any claim that the FDIC had knowledge.

Because of the divergent opinions on this issue, different courts would reach different results on these facts. The First Circuit would likely consider Johnson's evidence in determining whether to grant HIDC status to Cadle. In *FDIC v. Bracero & Rivera, Inc.*, 895 F.2d 824, 827-30 (CA1 1990), the First Circuit held that where a borrower paid the outstanding balance on a note to a bank and received a credit voucher from the bank, the FDIC could not claim that the note was still valid simply because it had not been stamped "paid, canceled, void, or otherwise," rather, the court concluded, the note was invalidated by acts independent of a secret agreement and the note therefore was not an asset protected by

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[16] See Section 7-3-305, Code of Alabama, 1975 (rights of holders in due course); Section 7-3-601 (discharge of parties); and Section 7-3-602, Code of Alabama, 1975, for the proposition that "no discharge of any party provided by this article is effective against a subsequent holder in due course unless he has notice thereof when he takes the instrument."

1823(e).[17] The opposite result would occur in the Sixth and Eleventh Circuits. In *FDIC v. Wood*, *supra*, 758 F.2d at 156, 162, the court held, "The FDIC cannot, therefore, be charged with knowledge of a defense merely because that information could be found in the bank's files." In *FDIC v. Merchant's Nat'l Bank*, 725 F.2d 634, 640 (CA11), *cert. denied*, 469 U.S. 829 (1984), the court held that the FDIC is not imputed with knowledge of an agreement which bank examiners may have discovered.

Whether and to what extent the federal HIDC rule should be applied is a question ripe for consideration by the Supreme Court. The divergent opinions of the federal circuit courts beg for clarification and uniformity. The case at bar presents this court with an opportunity to directly address an issue which, without clarification from this Court, promises to subject litigants to conflicting rulings across the nation.

VI. Faced with conflicting federal decisions, and no Alabama case authority, state court judges are reluctant to apply *D'Oench*, 1823(e), and holder in due course rule.

No reported decision in the Alabama Court of Civil Appeals or the Alabama Supreme Court cites *D'Oench* or 12 U.S.C. 1823. This vacuum of state authority leaves Alabama's state court judges with the difficult task of

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[17] See also *FDIC v. Grupo Girod Corp.*, 869 F.2d 15, 18 (CA1 1989) (holding that the FDIC's actual knowledge of the payment of a promissory note by a borrower where a ledger at a bank is stamped "paid" may prevent the FDIC from asserting the *D'Oench* or HIDC doctrines.

sorting through various cases from numerous federal and state courts, looking for an interpretation of these federal legal principles that fits their individual notions of justice.

A striking example of this confusion is demonstrated by the following. On June 6, 1997, in *The Cadle Company v. Atmore Tank, et al,* CV91-290, in the Circuit Court of Escambia County, Alabama, Judge Joseph Brogden, the same judge who presided over the case at bar, entered an interlocutory order under Rule 5 of the Alabama Rules of Civil Procedure. The order is included here as an appendix. App. H24-27. The purpose of the order was to allow Cadle to file a Petition for Permission to Appeal to the Alabama Supreme Court on the same federal issues raised in this petition.

That case involved a guarantor who claimed to have been released from a continuing guarantee by a side agreement with the bank. The judge, recognizing that the bank letter offered as proof of the release was insufficient as a matter of law to effectively release him, nevertheless denied Cadle's summary judgment motion, holding that it was a jury question as to whether the guarantor relied on the bank's representations that he had been released. Thus, the Judge concluded, the jury must determine whether the guaranty can be overcome by waiver or estoppel.

Recognizing that *D'Oench,* 1823(e), and the federal HIDC rule might preclude these defenses, the judge sought direction from the Alabama Supreme Court, stating, "There is substantial ground for difference of opinion on the question of law presented, and an immediate

appeal from this order will materially advance the ultimate termination of this litigation and avoid protracted and expensive litigation." App. H27. Just 46 days after Cadle's Petition was filed, the Alabama Supreme Court refused to hear the case. Alabama Supreme Court, No. 1961580, August 5, 1997.

Cadle is now facing an expensive trial in that case. The jury will likely be sympathetic toward the defendant's waiver and estoppel defenses, because, consistent with his ruling on summary judgment, the judge will refuse to apply *D'Oench,* 1823(e) and the federal HIDC rule to preclude the jury's consideration of the non-conforming side agreement. Another expensive appeal will follow, and Alabama's appellate courts may again refuse to follow the precedent of our nation's highest Court.

If Cadle were alone in this struggle, the present case might not warrant the attention of the Supreme Court of the United States. However, Cadle is one of hundreds of companies in this country whose role as purchaser and collector of failed bank assets plays a vital role in the health of our nation's banking system.[18] By purchasing assets from the FDIC, these companies free the FDIC to perform its important oversight functions; they help to minimize the cost to U.S. citizens of the numerous bank failures. A clear directive from this Court to apply the law of the land in Alabama would greatly benefit

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[18] From 1990 to 1996 the FDIC sold to private purchasers 587,681 loans, carrying a combined book value of $23 billion, at a purchase price of over $13 billion. *See* [http://www.fdic.gov/assets/ore_data/summary.html].

numerous litigants who, as purchasers of failed bank-assets, play an important role in the maintenance of a healthy national banking system.

Respectfully submitted,

GEORGE BENJAMIN JONES
Counsel of Record

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Atmore, AL 36504
(334) 368-9315

Counsel for Petitioner

September 18, 1997

APPENDIX A

STATE OF ALABAMA – JUDICIAL DEPARTMENT
THE COURT OF CIVIL APPEALS
SPECIAL TERM, 1996

2950245 – The Cadle Company v. Amelia P. Johnson

2950259 – Amelia P. Johnson v. The Cadle Company

Appeals from Escambia Circuit Court (CV-91-208)

BEATTY, Retired Justice

AFFIRMED. NO OPINION.

See Rule 53(a)(1) and (a)(2)(F), Alabama Rules of Appellate Procedure.

Robertson, P.J., and Yates and Crawley, JJ., concur.

Witness my hand this 16th day of Aug. , 1996.

/s/ John H. Wilkerson, Jr.
Clerk, Court of Civil Appeals of Alabama

APPENDIX B

September 27, 1996

THE COURT OF CIVIL APPEALS OF ALABAMA

RE: 2950245/2950259

The Cadle Company v. Amelia P. Johnson (Appeal from Escambia County Circuit Court: CV-91-208).

You are hereby notified that the following action was taken in the above cause by the Court of Civil Appeals:

Application for Rehearing Overruled. No opinion written on rehearing. 39(k) Motion Denied.

/s/ John H. Wilkerson, Jr.
John H. Wilkerson, Jr., Clerk
Court of Civil Appeals

Court of Civil Appeals
300 Dexter Avenue
Montgomery, AL 36104-3741
(334) 242-4095

APPENDIX C

IN THE SUPREME COURT OF ALABAMA

June 20, 1997

1960060

Ex parte The Cadle Company. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS (In re: The Cadle Company v. Amelia P. Johnson) (2950245) (Escambia: CV-91-208)

CERTIFICATE OF JUDGMENT
Writ Denied

The above cause having been duly submitted, IT IS CONSIDERED AND ORDERED that the petition for writ of certiorari is denied.

SEE, J. – Hooper, CJ., Maddox, Almon, Shores, Houston, Kennedy, Cook and Butts, JJ., concur.

Witness my hand this 20 day of Jun, 1997

/s/ Robert G. Esdale
Clerk, Supreme Court of Alabama

APPENDIX D

IN THE ALABAMA COURT OF CIVIL APPEALS

August 16, 1996

Civil Appeals Case 2950245/2950259

The Cadle Company v. Amelia P. Johnson (Appeal from Escambia County Circuit Court: CV-91-208).

CERTIFICATE OF JUDGMENT

The appeal in this cause having been duly submitted, IT IS CONSIDERED, ORDERED, AND ADJUDGED that the judgment of the court below is affirmed.

IT IS FURTHER ORDERED that the costs of appeal are taxed against the appellant(s) and sureties as provided by Rule 35, Alabama Rules of Appellate Procedure.

Witness, John H. Wilkerson, Jr.,
this 16th day of August, 1996
/s/ John H. Wilkerson, Jr.
Clerk
Court of Civil Appeals
State of Alabama

June 24, 1997

Petition for writ of certiorari filed in
Supreme Court 10-11-96; denied 6-20-97.
This certificate of judgment is
transmitted this date.

/s/ John H. Wilkerson, Jr.

APPENDIX E

CIVIL
CASE ACTION SUMMARY

State of Alabama
Unified Judicial System

Form C-5 Rev 10/88

Case Number
CV-91-208

IN THE Circuit Civil COURT

OF Escambia COUNTY

Plaintiff(s) The Cadle Company

Defendant(s) Amelia P. Johnson

Case Number CV-91-208

[X] Jury
[ ] Non Jury

Judge's Name BR0054
Joseph B. Brogden, Div. 1

DATE	ACTIONS, JUDGMENTS, CASE NOTES
7-9-91	Summons, Complaint and Pre-Trial Order mailed certified mail to Amelia P. Johnson. Pre-Trial Order to attorney. MB
	* * *
1-7-92	Motion for summary judgment is continued and not to be placed on the motion docket again until requested by either party. JBB
	* * *
5-8-92	deft response to Plaintiff mtn for SJ filed. GW

* * *

8-23-94 Plaintiff's amended motion for summary judgment is continued on motion of defendant with opposition from the plaintiff. JBB

9-06-94 Plaintiff's amended motion for summary judgment is continued. JBB

9-14-94 All pending motions for summary judgment are denied. JBB

* * *

10-16-95 All Post-Trial motions are denied. JBB

* * *

APPENDIX F

IN THE CIRCUIT COURT OF ESCAMBIA COUNTY, ALABAMA

THE CADLE COMPANY, PLAINTIFF,	]	CASE NO: CV-91-208
VS.	]	DIVISION: 1
AMELIA P. JOHNSON, DEFENDANT.	]	

JUDGMENT

This court having been reinvested with jurisdiction, by the Court of Civil Appeals, it is hereby ORDERED AND ADJUDGED that Judgment is entered in this case, in favor of the Defendant/Appellee, Amelia P. Johnson, and against the Plaintiff/Appellant, The Cadle Company.

The clerk of this court shall immediately furnish a copy of this order to all counsel of record, and the Clerk of the Court of Civil Appeals.

ORDERED this the 23rd day of April, 1996.

/s/ Joseph B. Brogden
JOSEPH B. BROGDEN
Circuit Judge

APPENDIX G

THE CADLE COMPANY,	*	IN THE CIRCUIT COURT
Plaintiff,	*	OF ESCAMBIA COUNTY, ALABAMA
vs.	*	
AMELIA P. JOHNSON,	*	CASE NUMBER CV 91-208
Defendant.	*	

PLAINTIFF'S AMENDED MOTION FOR SUMMARY JUDGMENT, PLAINTIFF'S RESPONSE TO DEFENDANT'S SUMMARY JUDGMENT MOTION, AND BRIEF IN SUPPORT THEREOF

Comes now Plaintiff, The Cadle Company, and hereby files Plaintiff's Amended Motion for Summary Judgment, Plaintiff's Response to Defendant's Summary Judgment Motion, and Brief in Support Thereof. Plaintiff moves the Court to enter, pursuant to Rule 56 of the Alabama Rules of Civil Procedure, a summary judgment in Plaintiff's favor for the relief demanded in his Complaint, and as grounds for his motions says that there is no genuine issue as to any material fact and that the Plaintiff is entitled to a judgment as a matter of law.

* * *

Attached to this motion is a brief filed in support of Plaintiff's Amended Motion for Summary Judgment, and in opposition to Defendant's summary judgment motion previously filed in this cause. In addition to the brief, this motion is based upon the pleadings, and the various depositions, interrogatory answers, and affidavits, filed as exhibits to the brief filed herewith.

A. FACTS.

Facts Relevant to Plaintiff's Motion for Summary Judgment.

1. Defendant, Amelia Johnson, signed the promissory note dated March 9, 1984, in the principal amount of $10,000.00, which note was attached as Exhibit A to the Complaint. She admitted signing this note in her deposition, and in her interrogatory answers. Said note is attached hereto as Exhibit 1, Note A.

2. Defendant, Amelia Johnson signed the promissory note dated June 18, 1984, in the principal amount of $2,000.00, which note was attached as Exhibit B to the Complaint. She admitted signing this note in her deposition, and in her interrogatory answers. Said note is attached hereto as Exhibit 1, Note B.

3. Defendant, Amelia Johnson signed the promissory note dated October 8, 1984, in the principal amount of $12,000.00, which note was attached as Exhibit C to the Complaint. She admitted signing this note in her deposition, and in her interrogatory answers. Said note is attached hereto as Exhibit 1, Note C.

4. There is a dispute as to whether the $12,000.00 note (Note C) was a renewal of notes A and B. However, it is undisputed that neither Note A nor Note B were ever paid, except to the extent that a "renewal" of Note A or Note B may have extinguished the debtor's obligation on those notes. That is a legal conclusion which will be addressed below.

5. Amelia Johnson argues that Note C was a renewal of Notes A and B and represented the same money.

6. Johnson also argues that Note C was also later renewed by one of two separate notes executed by her former husband, Larry Johnson. Although her testimony was not consistent on this, she contends that Larry Johnson's execution of a note dated October 19, 1984, in the amount of $42,250.00 (Exhibit 1, Note D), or his execution of a note dated February 12, 1985, in the amount of $69,683.08 (Exhibit 1, Note H), renewed Note C. Johnson argues that the legal effect of such a "renewal" is to relieve Amelia Johnson from any further obligation on notes A, B and C.

For the purpose of clarity, the relevant notes for the Court's consideration are the following:

Exhibit Number	Date	Amount	Signed by
1, Note A	03/09/84	$10,000.00	Amelia Johnson and Larry Johnson
1, Note B	06/18/84	$ 2,000.00	Amelia Johnson and Larry Johnson
1, Note C	10/08/84	$12,000.00	Amelia Johnson and Larry Johnson
1 Note D	10/19/84	$42,256.00	Larry Johnson
1 Note H	02/12/85	$69,683.08	Larry Johnson

7. It is undisputed that except to the extent that "renewal" of any of the above referenced notes may as a legal matter constitute "payment", none of the above referenced notes have been paid. The Defendant testified that Note D or Note H "renewed" Note C. However, the Defendant also testified that while Notes D and H may

themselves have been renewed on one or more occasion, they were never paid. **Thus, it is undisputed that First State Bank of Atmore (or its successors) never received the money which was borrowed by Amelia Johnson and Larry Johnson. The question is merely whether the "renewals" represented by Note D or H, which renewals were signed only by Larry Johnson, relieved Defendant, Amelia Johnson from further obligation to the holder of Notes A, B and C.** As will be argued below, Plaintiff contends that such "renewals" do not relieve Defendant, Amelia Johnson, from liability under these circumstances.

8. The Cadle Company has in its possession the original Notes A, B, C, D and H. The original of each of these notes bears proper endorsement to The Cadle Company from the FDIC as successor in interest to First State Bank of Atmore.

* * *

D. Argument.

1. REGARDING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT.

Cadle contends that the affidavits, depositions, and other material filed in support of its Motion for Summary Judgment, support but one legal conclusion – that Johnson owes to Cadle the principal sum of $24,000.00 plus interest and attorney fees.

Cadle here asserts two main arguments that are divided into subparts in the main argument. First, Cadle contends that the *D'Oench Duhme & Co. v. FDIC*, 315 U.S. 447, 62 S.Ct. 676, 86 L.Ed. 956 (1942), 12 U.S.C. Section

1823(e), and numerous other cases cited in this brief, require the Court in litigation on promissory notes involving the FDIC or its successors, to focus its attention on what appears in the bank records. When it appears, as here, from the documents in the bank files, that the bank's successor possesses a note signed by a debtor, the Court is precluded from considering, in defense of the debtor, circumstances surrounding her execution of the documents, and her dealings with the bank, unless the circumstances are appropriately documented in the bank files. Johnson executed three promissory notes. These documents were all in the files of First State Bank when the FDIC closed the bank in 1987. The documents were later sold by the FDIC to Cadle as part of a larger asset package. On the face of the foregoing documents, it appears that the First State Bank and here, its successor, has the right to collect from Johnson the face amount of the notes.

Federal law precludes Johnson from asserting in this context against the FDIC or its successor, Cadle, any defense based on any agreement, arrangement, understanding or scheme not fully documented in the bank's records. *D'Oench Duhme and Co. v. FDIC*, 315 U.S. 447, 62 S.Ct. 676, 86 L.Ed. 956 (1942) and 12 U.S.C. Section 1823(e). Thus, Johnson's contentions (that note C represents the same money as notes A and B, and that her liability on all 3 notes was terminated by a later "renewal note" executed solely by her then husband Larry Johnson), can not form the basis for a valid defense against Cadle unless it can be established from documents appearing in the bank files, which documents meet the recording requirements of 12 U.S.C. Section 1823(e). The

FDIC and Cadle are entitled to rely on the face of the documents appearing in the bank file and Johnson's defense based on a scheme not documented in the bank files, is precluded as a matter of law. The Court is bound by the Federal D'Oench Duhme doctrine, 12 U.S.C. Section 1823(e), and the numerous other cases cited in the main body of this brief, to give effect to the documents as they appear in the bank file. It would be error to allow a defense based on circumstances not documented in the bank file.

Second, and alternatively, to the extent that the D'Oench doctrine is not viewed as an absolute bar in suits on promissory notes to any defenses not fully appearing in the bank file, the facts in this case illustrate liability by Johnson on notes A, B and C, as a matter of law. The language on the notes themselves indicates that the makers are not relieved from liability by future renewals of the note. Therefore, Johnson's contentions that the "renewals" satisfy her obligations, must fail.

The U. S. Supreme Court case of *D'Oench Duhme and Co. v. FDIC*, 315 U.S. 447, 62 S.Ct. 676, 86 L.Ed. 956 (1942), which precludes a debtor from asserting most defenses against the FDIC where the debtor lends himself to a scheme or arrangement whereby the banking authority or the insuring entity (FDIC) is likely to be misled, is directly applicable to this case.

In *D'Oench Duhme and Co. v. FDIC, supra*, the United States Supreme Court held that as a matter of Federal Common Law, the Federal Deposition Insurance Corporation ("FDIC") could rely upon a defense of estoppel to prohibit parties from relying upon alleged arrangements

not clearly appearing in the bank records. The Court reasoned that the congressional purpose for creating the FDIC was to protect the fiscal stability of financial institutions, thereby insuring the availability of funds deposited within those institutions. Because unrecorded special arrangements result in the FDIC being unaware of the true level of a given bank's assets and commitments, such arrangements prevent the FDIC from rigorously overseeing the bank's operations. Therefore, to protect the FDIC and the public funds which it administers against misrepresentations as to the assets in the banks which the FDIC insures, the Court in *D'Oench Duhme* concluded that a defense to collection of a note could not be premised upon "a scheme or arrangement whereby the banking authority . . . was likely to be misled." *D'Oench Duhme, supra,* 315 U.S. at 460, 62 S.Ct at 681; See also *Langley v. FDIC,* 484 U.S. 86, 108 S.Ct. 396, 98 L.Ed.2d 340 (1987).

In *FDIC v. McCullough,* the Eleventh Circuit Court of Appeals determined that the issue of whether an obligor's defense is barred by the *D'Oench* doctrine depends upon whether the purported agreement relied upon by the obligor was ever memorialized in writing or otherwise made explicit such that the FDIC would have had knowledge of the bank's obligations during an evaluation of the bank's records. *FDIC v. McCullough,* 911 F.2d 593, 600 (11th Cir. 1990). In *Langley v. FDIC, supra,* the U.S. Supreme court expanded the definition of "agreement" to just about any unrecorded factual scenario, including facts such as those surrounding the execution of the various instruments purchased by Cadle here.

In 1950, Congress enacted 12 U.S.C. Section 1823(e) which is similar to the D'Oench Duhme Doctrine and sets

out requirements which an agreement must meet to be enforceable against the FDIC. The statute reads:

> "No agreement which tends to diminish or defeat the interest of the corporation in any asset acquired by it under this Section or Section 1821 of this title, either as security for a loan or by purchase or as receiver for any insurance depository institution, shall be valid against the corporation unless such agreement
>
> (1) Is in writing,
>
> (2) Was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,
>
> (3) Was approved by the Board of Directors of the depository institution or its Loan Committee, which approval shall be reflected in the minutes of said Board or Committee, and
>
> (4) Has been continuously, from the time of its execution, an official record of the depository institution."

One seeking to prove an agreement against the FDIC must meet all four requirements of the statute. See *FDIC v. Merchants National Bank of Mobile*, 725 F.2d 634 (11th Cir. 1984), *cert denied*, 469 U.S. 829, 105 S.Ct 114, 83 L.Ed.2d 57 (1984); *FSLIC v. Gordy*, 928 F.2d 1558 (11th Cir. 1991).

In addition to the D'Oench Duhme Doctrine and 12 U.S.C. Section 1823(e), another Federal statute, enacted in 1989, provides protection to the FDIC and its successors in this instance. 12 U.S.C. Section 1821(d)(9)(A), provides

that "Any agreement which does not meet the requirements set forth in Section 1823(e) shall not form the basis of, or substantially compromise, a claim against the receiver or the corporation."

The D'Oench Duhme Doctrine and its statutory counterparts serve three principle policies. One is to enable bank examiners to rely on a bank's records:

> "One purpose of Section 1823(e) is to allow Federal and State bank examiners to rely on a bank's records in evaluating the worth of the bank's assets. Such evaluations are necessary when a bank is examined for fiscal soundness by Federal or State banking authorities, and when the FDIC is deciding whether to liquidate a failed bank, or to provide financing for purchase of its assets (and assumption of its liabilities) by another bank. . . . Neither the FDIC nor State banking authorities would be able to make reliable evaluations if bank records contained seemingly unqualified notes that are in fact subject to undisclosed conditions."

Langley v. FDIC, 484 U.S. 86, 91-92, 108 S.Ct. 396, 98 L.Ed.2d 340 (1987).

A second policy furthered by the D'Oench Duhme Doctrine and Section 1823(e) and 1821(d)(9)(A) is protecting the tax payers who fund the FDIC from paying for these unrecorded agreements. *Bowen v. FDIC*, 915 F.2d 1013, 1017 (5th Cir. 1990).

A third policy served is imposing the cost of unrecorded agreements upon those who could have insured that their entire agreement was properly recorded:

> "Although this result may seem unfair to Boumann, he had the opportunity to include the entire agreement in writing. By not doing so, he "lent himself to a scheme or arrangement whereby the banking authority . . . was or was likely to be mislead" *D'Oench* 315 U.S. 461, 62 S.Ct 681. That Boumann may have had no intention of misleading regulators is of no moment. As between private parties and Federal Deposit Insurance agencies, both Congress and the Supreme Court have placed the burden on private parties to document fully the contours of their obligations from the inception of the transaction.

Boumann v. Saver's Federal Savings and Loan Association, 934 F.2d 1506, 1517 (11th Cir. 1991).

The D'Oench Doctrine, 12 U.S.C. Section 1823(e), and 12 U.S.C. Section 1821(d)(9)(A), apply not only to the FDIC, the RTC, and the FSLIC, but also to their assignees. *Bell and Murphy and Associates v. Interfirst Bank Gateway,* 894 F.2d 750 (5th Cir. 1990); *Castleglen, Inc. v. RTC,* 984 F.2d 1571, 1577 (10th Cir. 1993); *Newton v. Uniwest Financial Corp.,* 967 F.2d 340, 347 (9th Cir. 1992); *FSLIC v. Cribbs,* 918 F.2d 557, 560 (5th Cir. 1990); *FDIC v. Newhart,* 892 F.2d 47 (8th Cir. 1989). Section 7-3-201(1), Code of Alabama, 1975. Thus, Cadle is entitled to stand in the shoes of the FDIC in this case.

Courts across this country have applied the D'Oench Duhme Doctrine and the Federal statutes which have expanded and interpreted that doctrine in a variety of situations. These legal theories have been applied so as to bar nearly every defense raised by the maker of the note against the FDIC (or its successors). See, *FSLIC v. Murray,*

853 F.2d 1251, 1256 (5th Cir. 1988) and *FSLIC v. LaFayette Investment Properties*, 855 F.2d 196, 198 (5th Cir. 1988), baring defense of fraud; *FDIC v. McClanahan*, 795 F.2d 512, 516-17 (5th Cir. 1986), baring defenses of failure of consideration and fraud in inducement; *FDIC v. Investors Associates X, Ltd*, 775 F.2d 152, 155 (6th Cir. 1985), baring all defenses arising out of a fraudulent scheme, including a representation made by another participant in the scheme; *FDIC v. Dan Laanen*, 769 F.2d 666, 667 (10th Cir. 1985), baring oral outside agreements; *FDIC v. Gulf Life Insurance Company*, 737 F.2d 1513, 1517-18 (11th Cir. 1984), baring defenses of waiver, estoppel and unjust enrichment; *FDIC v. Vestriny*, 620 F.Supp. 1271, 73-74 (D.C. Kan. 1985), baring fraud in the inducement.

Once Cadle shows it has possession of the original notes, this Court is bound to grant summary judgment for Cadle unless Johnson can establish **from documents appearing in the bank files** (and meeting the necessary signature and board approval requirements of Section 1823(e)), facts which would overcome the apparent liability established by the fact of Johnson's signature on the notes. Johnson's contention that note C renewed notes A and B is supported by two bits of evidence, neither of which meet the requirements of 1823(e). First is her testimony that "R# 0900023326 & 0900023318" on note C means it renews notes A and B. Cadle testified that he interpreted this to mean the designated notes were "related" to note C, which indeed they were, since they were signed by the same makers. However, Johnson's interpretation of this inscription on note C is not apparent to anyone examining the bank file, including the FDIC. Indeed, Johnson herself admits this in her deposition

testimony at pages 19-20 (Exhibit 2). Thus, this inscription can not, as a matter of law, form the basis of Johnson's defense.

The second bit of evidence raised by Johnson is the unauthenticated credit and debit memo slips that Johnson testified about at her deposition. These documents were not properly authenticated and therefore, can not be considered by this Court. Even if the documents were authenticated, and even if Johnson later is able to depose an FDIC official and show that these debit and credit slips were in the FDIC's records in this case, such a showing would still be insufficient to overcome the requirements of 12 U.S.C. 1823(e). That statute requires that any document forming the basis of a defense against the FDIC (or here its successor), must 1) be in writing; 2) be *executed* by the *bank* and the *debtor* contemporaneously with the bank's acquisition of the asset; 3) be approved by the bank's board or loan committee, which approval is reflected in the minutes of the board or committee; and 4) be continuously an official record of the depository institution. Absent a showing by Johnson that these slips meet these four requirements, they can not form the basis of her defense.

Even if the credit and debit slips could be used by Defendant to formulate a defense, that defense would here be insufficient to overcome Defendant's burden to prove her defense. Section 7-3-307(2), Code of Alabama, 1975. Johnson admitted that she is not and never has been the custodian of these records, and yet she attempts to explain their meaning. The credit and debit documents are such that only an individual familiar with the actual practices of the bank in generating these documents

could testify as to their meaning. Johnson's assertion that the credit and debit slips show that note C renewed notes A and B, and that note D or H renewed note C, is pure speculation.

Since Johnson has not presented any competent evidence to overcome the liability established by Cadle's presentation of the three notes bearing her signature, Cadle is entitled to summary judgment on the principal and interest on each note, plus attorney fees as provided therein.

Alternatively, the Plaintiff here contends that at the very least, partial summary judgment should be entered in its favor against the Defendant, Amelia Johnson in the amount of $12,000.00, plus interest and attorney fees. While there is no substantial proof that the $12,000.00 represented by Note C is the same principal money as the $10,000.00 and $2,000.00 sums in Notes A and B, we can assume that to be true for the purpose of arguing in this brief. Assuming that to be true, Defendant, Amelia Johnson, still owes to The Cadle Company the sum of $12,000.00, plus interest and attorney fees for at least three reasons.

First, the language of the promissory notes executed by Amelia Johnson clearly state that she will not be relieved from her obligation to pay the note by renewal of the note. Each of the promissory notes referred to in the preceding section contains the following provision:

> "I understand that my obligation to pay this note is independent of the obligation of any other person who has also agreed to pay it. You may release any of us, release any security,

> waive any right you may have against any of us, extend new credit to any of us, renew this note, or all of the above, without affecting my obligation to pay the loan amount."

Plaintiff contends that this language binds Amelia Johnson to the obligation until it is paid, not merely until it is renewed.

Second, the undisputed facts in this case, including the fact that The Cadle Company has in its possession the original Notes A, B and C, support the conclusion, under Alabama law, that any later "renewal" of note C does not constitute payment thereof, or release the makers of Note C from liability on that note. Stated in another fashion, the concept of "payment by renewal" is not recognized under Alabama law. *Green v. Nabois*, 132 So. 889 (Ala. 1931); *Anniston Loan and Trust Co. v. Stickney*, 108 Ala. 146, 19 So. 63.

In litigation between a debtor and a bank, this issue can become a question of intention to be deduced from all the facts and circumstances of the case. *Montgomery Bank and Trust Co. v. Jackson*, 190 Ala. 411, 67 So. 235. *Martin v. First National Bank of Opelika*, 184 So.2d 815 (Ala. 1966). However, here, Cadle steps into the shoes of the FDIC, and all evidence of the parties' intentions at the time of the execution of these notes is precluded as a matter of law, except to the extent it conforms to the requirements of 12 U.S.C. Section 1823(e). *See also D'Oench Duhme, supra* and the numerous related cases cited herein. Thus, the Court is bound to give effect here to the plain language of the notes (quoted above) which provide that renewals do not extinguish the original debt.

Even without the benefit of the Federal *D'Oench Duhme* doctrine and 12 U.S.C. Section 1823(e), Cadle would here prevail based on the evidence of the parties' intentions evident in the deposition testimony and other facts here presented to the Court. The fact that the bank retained the original notes is evidence that the renewals were not meant to extinguish the underlying indebtedness. *Montgomery Bank and Trust Co. v. Jackson*, 67 So. 235 (Ala. 1914); *Martin v. First National Bank of Opelika, supra.* The fact that the bank did not mark the original notes "paid" at the time of the renewal is further evidence of this intention. *Greer v. Nabors, supra.*

Thus, even if the concept "payment by renewal" is a concept recognized by Alabama law, any note purporting to be such a "payment by renewal" would have to meet the requirements of 12 U.S.C. Section 1823(e) in order to be binding upon the FDIC or its successors. None of the "renewal" notes in this case meet the standard set in that Federal statute, and therefore, even if Alabama law recognizes the concept of "payment by renewal," The Cadle Company, as FDIC's successor in interest, is not bound by such result, and is still entitled to collect against the Defendant, Amelia Johnson. 12 U.S.C. Section 1823(e); *D'Oench Duhme, supra.*

* * *

F. CONCLUSION

For all of the reasons stated herein, Plaintiff prays that this Court will grant summary judgment in favor of Plaintiff and against Defendant for the principal sum of $24,000.00, plus interest, attorney fees and costs. In the

alternative, Plaintiff prays for partial summary judgment against Defendant for the principal amount of $12,000.00, plus interest, attorney fees and costs. Plaintiff further prays that this Court will grant to Plaintiff summary judgment on Defendant's counterclaim and deny Defendant's Motion for Summary Judgment.

/s/ George B. Jones
George B. Jones
Attorney for Plaintiff
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served on the party listed below, by placing a copy of the same in regular U.S. mail, postage paid, this 2nd day of August, 1994.

W. Beatty Pearson, Esq.
P. O. Box 980
Spanish Fort, Alabama 36527

/s/ George B. Jones
GEORGE B. JONES

APPENDIX H

IN THE CIRCUIT COURT OF
ESCAMBIA COUNTY, ALABAMA

THE CADLE COMPANY, PLAINTIFF, VS. ATMORE TANK AND FABRICATING COMPANY, INC., CHARLES A. SNYDER, CONRAD WESSELHOEFT, JOHN A. FUNDERBURK, FRANK E. PILSCH, and WILLIAM B. WILSON, DEFENDANTS.	]]]]]]]]]]]	CASE NO: CV-91-290 DIVISION: 1

ORDER

This matter came before the court on March 4, 1997, for hearing on the Plaintiff's Motion For Summary Judgment against the Defendant, Conrad Wesselhoeft (hereinafter referred to as "Wesselhoeft"). The Plaintiff's Motion For Summary Judgment is denied, and the court hereby makes the following findings of fact and law in this case:

1. By three separate promissory notes and one renewal agreement, the Defendant, Atmore Tank and Fabricating Company, Inc. (hereinafter referred to as "Atmore Tank") became indebted to First State Bank of Atmore, Alabama (hereinafter referred to as "First State Bank") in a principal sum of One Hundred Eighty Six Thousand Ten Dollars ($186,010.00) Dollars.

2. On May 17, 1984, Wesselhoeft executed a personal guaranty of the indebtedness of Atmore Tank to First State Bank.

3. Subsequently, Wesselhoeft was approached by the Defendants, Charles Snyder and William B. Wilson (hereinafter referred to as "Snyder" and "Wilson", respectively), officers of Atmore Tank, concerning their desire to purchase Wesselhoeft's interest in Atmore Tank, and having Wilson substituted for Wesselhoeft in his official capacity as an officer with Atmore Tank and as a guarantor to the First State Bank. Wesselhoeft agreed to the sale and his subsequent removal as an official officer of Atmore Tank, upon the transfer of certain assets and his release from any and all obligations and/or indebtedness of Atmore Tank.

4. Wesselhoeft retained an escrow agent, who held his stock in Atmore Tank, pending the transfer of the aforesaid assets and release on all notes and guarantees to First State Bank.

5. While operating under a Memorandum of Understanding from the FDIC, First State Bank, by and through its Vice-President, R. Stanley Childress, sent a letter to Snyder, dated September 20, 1985, which stated the following:

"This is to advice you that as of this date, First State Bank of Atmore hereby releases Mr. Conrad Wesselhoeft from any liability presently owed by Atmore Tank, Inc., and/or any future indebtedness incurred by Atmore Tank, Inc. Mr. William B. Wilson has guaranteed personally the liabilities of Atmore Tank, Inc., as the Secretary/Treasurer."

In reliance thereon, Wesselhoeft acted to his detriment.

6. In February of 1987, the FDIC acquired the interest of First State Bank in said notes, renewal and guaranty, as receiver/liquidator of said bank. Neither ever made any demand upon Wesselhoeft to pay the subject debt.

7. In December of 1990, the FDIC assigned all of its rights, title and interest in said notes, guaranty and renewal to the Plaintiff.

8. After applying all set offs attributable to sums collected from other Defendants, the total amount of One Hundred Seventy Five Thousand Nine Hundred Forty Two and 75/100 ($175,945.75) Dollars is still owed, and that is the amount which Plaintiff seeks from Wesselhoeft.

9. In defense of the Plaintiff's claim against him, Wesselhoeft contends that First State Bank released him from his obligations under the guaranty agreement.

10. Plaintiff contends that the September 20, 1985 letter from Childress is insufficient to meet the requirements for release set forth in the guaranty agreement. The court agrees, and is of the opinion that said letter is insufficient, as a matter of law, to constitute an effective release from the guaranty agreement. However, Wesselhoeft has pled the affirmative defense of waiver and estoppel, and in the opinion of the court, it is a question of fact as to whether such is a valid defense in this case. That is a question for the jury, and for this reason, the court has denied Plaintiff's motion for summary judgment. But for this particular defense, the court

would be inclined to grant Plaintiff's motion for summary judgment, because the court finds that absent the said letter from Childress, and his affidavit concerning same, the facts tend to favor Plaintiff's position.

Pursuant to the provisions of Rule 5 of the Alabama Rules of Appellant Procedure, the court further finds that this order is an interlocutory order and involves a controlling question of law. There is substantial ground for difference of opinion on the question of law presented, and an immediate appeal from this order will materially advance the ultimate termination of this litigation and avoid protracted and expensive litigation.

Done this the 6th day of June, 1997.

/s/ Joseph B. Brogden
JOSEPH B. BROGDEN
Circuit Judge

APPENDIX I

IN THE ALABAMA COURT OF CIVIL APPEALS
CASE NO. 2950245

THE CADLE COMPANY

Appellant,

vs.

AMELIA P. JOHNSON,

Appellee.

On Appeal From the
Circuit Court of Escambia County, Alabama
CV 91-208

APPLICATION FOR REHEARING UNDER RULE 40, AND BRIEF IN SUPPORT THEREOF

Comes now The Cadle Company, Appellant in the above styled cause,and hereby makes application to this Court for rehearing pursuant to the provisions of Rule 40 of the Alabama Rules of Appellant Procedure. Appellant previously appealed from an order of the Circuit Judge of Escambia County, Alabama, denying Appellant's pre-trial motion for summary judgment. The Circuit Judge's order denying summary judgment occurred in Civil Action Number CV 91-208 in the Circuit Court of Escambia County, Alabama. Subsequent to the Circuit Court's denial of Cadle's summary judgment motion, the case was tried to a jury which rendered a verdict against Cadle on the claims it asserted in the case against Johnson. From the final judgment in that case, Cadle appealed to this Court in Appellate Case Number 2950245, raising as the sole issue on appeal the question: "DID THE

TRIAL COURT ERR IN DENYING CADLE'S MOTION FOR SUMMARY JUDGMENT PRIOR TO TRIAL?"

On August 16, 1996, this Court affirmed, without opinion, the judgment of the Escambia County Circuit Court. In doing so, this Court cited Rule 53(a)(1) and (a)(2)(F), Alabama Rules of Appellate Procedure. In stating these rules as the basis for the Court's opinion, the Alabama Court of Civil Appeals has indicated "that an opinion in the case would serve no significant precedential purpose," Rule 53(a)(1), and also that "the Court, after a review of the record and the contentions of the parties, concludes that the judgment or order was entered without an error of law." Rule 53(a)(2)(F).

A. PRECEDENTIAL VALUE OF AN OPINION IN THIS CASE.

Cadle contends that an opinion in this case would have significant precedential authority in the State of Alabama, because no Alabama state court decision to date has addressed the following legal issues, each of which is critical to the Court's decision in this case:

1. No Alabama state court opinion has dealt with the application of Section 7-3-310, Code of Alabama, 1975, formerly Section 7-3-802, Code of Alabama, 1975, in the context of the renewal of a promissory note. While Alabama cases have applied this statute in a situation involving a check, see *Kelley v. Kelley*, 53 Ala. App. 608, 303 So.2d 108 (1974), and courts in other states have applied their version of the same statute to promissory notes, see *Woods-Tucker Leasing Corp. v. Kellum* 641 F.2d 210 (5th Cir. 1981), and *First Pennsylvania Bank, N.A. v. Triester*, 251 PA.

Super. 372, 380 A.2d 826 (1977), no Alabama court has addressed the statute in a promissory note situation. Thus, there would be significant precedential value in a decision by this Court applying said statute to a case involving the renewal of a promissory note.

2. An opinion by the Alabama Court of Civil Appeals would serve significant precedential purpose because no Alabama state court case has previously applied the Federal statute 12 U.S.C. Section 1823(e) in a manner giving an assignee of a bank asset formerly held by the FDIC the protection of that Federal statute. This Federal statue protects the Federal Deposit Insurance Corporation and thereby the American taxpayer, by creating a statutory requirement that any agreement tending to diminish or defeat the interest of of the FDIC or its assignee in any bank asset must, to be enforceable against the FDIC or its assignee, be (1) in writing, (2) executed by the bank and the person claiming an adverse interest contemporaneously with with the acquisition of the asset by the bank, (3) be approved by the board of directors or loan committee of the bank, which approval be reflected in the minutes of the board or committee, and (4) that the written record of this agreement have been continuously from the time of its execution an official record of the depository institution.

Johnson asserted at summary judgment that renewal of the various promissory notes was to be treated as a payment or release of her obligations under the note, and a substitution of her husband as the sole obligor. If this agreement between Johnson and the bank were given legal effect, it would diminish the rights of the FDIC in the bank notes by limiting their recovery to Mr. Johnson

only, and eliminating Ms. Johnson as an obligor. Cadle asserted, as the assignee of the FDIC in these bank notes, the protection of this Federal statute. Because no Alabama state court decision has addressed 12 U.S.C. Section 1823(e) in this context, the opinion in this case would be of great precedential value in determining the scope and applicability of this Federal statute to transactions involving promissory notes made at State banking institutions.

3. Federal law affords holder in due course status to the FDIC, which status does not derive from the ordinary state law Uniform Commercial Code definition of holder in due course. Thus, notice of default, bulk transfer and other exceptions to the state court holder in due course law do not apply. Federal common law has created a new mechanism for the FDIC to achieve holder in due course status, which functions independent of the statutory prerequisites of a particular state. See *FDIC v. McCullough*, 911 F.2d 592 (11th Cir. 1990). Courts throughout the country have been less than uniform in their application of the holder in due course status described in the *FDIC v. McCullough* opinion, and no Alabama state court opinion to date has addressed the issue. Therefore, the scope and effect of the Federal holder in due course rule summarized above would make the opinion of the Alabama Court Civil Appeals in this case extremely useful in establishing precedent in future Alabama state court decisions.

4. The D'Oench Doctrine, originating from the 1942 U.S. Supreme Court decision in *D'Oench Duhme and Company v. FDIC*, 315 U.S. 447, 62 S.Ct. 676, 86 L.Ed. 956 (1942) precludes a debtor from asserting most defenses against the FDIC or its successors where the debtor lends

himself to a scheme or arrangement whereby the banking authority or insuring entity is likely to be misled. Federal decisions in various jurisdictions contain differing interpretations and applications of this complicated Federal case law. Despite the numerous Federal decisions giving differing application to this Federal doctrine, there is no uniform rule in Alabama, because no Alabama state court decision has addressed the issue. Therefore, a decision by the Alabama Court of Civil Appeals addressing the application of the Federal D'Oench Duhme Doctrine to the facts of this case would constitute significant precedential authority for future decisions by state circuit courts.

B. ERRORS OF LAW IN TRIAL COURT RULING.

The decision of the Alabama Court of Civil Appeals in this case was based in part on Rule 53(a)(2)(f), which states that, "The Court, after a review of the record and contentions of the parties, concludes that the judgment or order was entered without an error of law." The appeal in this case by the Appellant (Appeal Number 2950245), challenged a single ruling of the trial court, to-wit: the Trial Court's pre-trial denial of Cadle's summary judgment motions. For the following reasons, the trial court committed errors of law in failing to grant Cadle's motion for summary judgment on the three promissory notes which form the basis of the claims against Johnson filed in the Escambia County Circuit Court case:

1. The Trial Court erred as a matter of law by failing to treat the renewal note or notes of Larry Johnson as a suspension of Amelia Johnson's obligations on the notes, rather than a cancellation or payment of those notes, as

required by Alabama Uniform Commercial Code Section 7-3-310, Code of Alabama, 1975, formerly Section 7-3-802, Code of Alabama, 1975.

2. The Trial Court erred as a matter of law by failing to apply the provisions of Section 7-3-606, Code of Alabama, 1975, and the state court decisions of *Salter v. AmSouth Bank, N.A.*, 487 So.2d 927 (Ala. Civ. App. 1985); *Pilalas v. Baldwin County Savings and Loan Association*, 549 So.2d 92 (Ala. 1989), to uphold the express waiver provisions contained in the promissory notes signed by Johnson.

The waiver provisions referred to above, contained on the reverse side of each note signed by Amelia Johnson, stated that the obligor understands that the bank may release any co-obligor, renew the note, or engage in other similar activities, "without affecting my obligation to pay the loan amount." The Trial Court's refusal to apply the above cited legal authority to enforce the waiver language contained on the notes, constituted an error of law in this case.

3. The facts before the Court at the time of the Court's ruling on the motions for summary judgment, even viewed in a light most favorable to Johnson, demonstrate that the three original promissory notes bearing Amelia Johnson's signature appeared in the bank files of First State Bank, were transferred to the FDIC when the FDIC closed said bank, and were further transferred by the FDIC to The Cadle Company. The original notes were in the possession of The Cadle Company, and there was no dispute as to Ms. Johnson's signature.

Johnson presented evidence at summary judgment that one or more of the three notes had been renewed by separate promissory notes executed by her former husband, Larry Johnson. Johnson asserted that the renewal of these notes by her former husband constituted payment of the notes and thereby discharged her from any further obligation on the debt.

By failing to grant summary judgment for Cadle on the three notes, the Trial court made a legal conclusion that renewal notes, in some circumstances, may constitute payment of a former note. Although such a legal conclusion would be precluded by the rules of law summarized above, to constitute "payment" such renewal notes would also have to be accompanied by an agreement between the bank and the debtors for the renewal notes to constitute "payment."

This conclusion is mandated by Section 7-3-310, Code of Alabama, 1975, formerly Section 7-3-802, Code of Alabama, 1975, which was summarized above. That statute states that "unless otherwise agreed" an instrument given for an underlying obligation *suspends* but does not discharge the former obligation. Thus, the general rule is that a renewal note merely suspends the obligations created by the former note. An exception is indicated only if there is a contrary "agreement".

The requirement of an agreement to avoid the consequences of Section 7-3-310, formerly Section 7-3-802 (suspension rather than discharge), places this case squarely under the ambit of the federal statute, 12 U.S.C. 1823(e). This statute requires that any agreement which tends to diminish or defeat the interest of the FDIC, in order to be

valid against the corporation (or its successors) be (1) in writing, (2) executed by the bank and the person claiming an adverse interest thereunder (which execution must be contemporaneous with the acquisition of the asset by the bank), (3) the agreement be approved by the board of directors of the depository institution or its loan committee which approval be reflected in the minutes of the board or committee, and (4) the agreement have been continuously from the time of its execution an official record of the depository institution. 12 U.S.C. Section 1823(e).

The facts before the Trial Court at the time of summary judgment clearly indicate that there was no written agreement altering the requirement of the U.C.C provisions cited above. Thus, because of 12 U.S.C. 1823(e), even if the bank and the Johnsons agreed that Amelia was to be relieved from further obligation on the notes by Larry's execution of renewal notes, that agreement, because it was not reduced to writing, can not be used as a defense against the FDIC or its successor's collection of the notes.

Only two possible legal conclusions result from the facts in this case. They are as follows:

(a) There was no agreement between the Johnsons and the bank for the renewal notes to discharge Amelia's obligation. If there was no agreement, then the renewal notes merely suspend Amelia Johnson's obligation to pay the debts, they do not discharge it. Thus, regardless or other circumstances surrounding the execution of the renewal notes, without an agreement for the new notes to discharge Amelia as an obligor, the Uniform Commercial

Code requires that Amelia's obligations are merely suspended until the renewal notes are later dishonored. Thus, if the Trial Court, in reviewing the record before it at the time of its ruling on the summary judgment motions, concluded that there was no agreement between the bank and the Johnsons, then it was required by U.C.C. Section Section 7-3-310, formerly Section 7-3-802, to treat the renewal notes as a suspension of Amelia's obligation, rather than a discharge of that obligation.

(b) The second possible factual scenario is that there was an agreement between the bank and the Johnsons to treat the renewal notes as a discharge of Amelia Johnson's obligation as co-obligor on the former notes. While the facts may not be totally clear as to whether such an agreement existed, if we assume an agreement did exist, it still is insufficient to present a defense because of 12 U.S.C. 1823(e). The record is clear that there is no written agreement, and therefore any agreement that may have existed would not create a defense. It is not even necessary to discuss the second, third and fourth requirements of the federal statute.

4. The Trial Court erred in this case because, as successor in interest to the FDIC, The Cadle Company acquired the FDIC's federal holder in due course status. Johnson's defense of payment is a personal defense. Even if the defense of "Payment" could be established from the record before the Court at the time of its ruling on the summary judgment motions, it would not be effective against Cadle.

Personal defenses are not effective against holders in due course unless the holder has notice of the defense

when it takes the instrument. There was no evidence that the FDIC had notice of the defense of payment. The three notes signed by Amelia were still in the bank file, acquired by the FDIC. The fact of the FDIC's endorsement of the notes to Cadle indicates that the FDIC believed the notes were genuine and collectible. Cadle, as transferee of the notes from the FDIC, acquires all of the FDIC's rights in said instrument, including its holder in due course status. Section 7-3-201, Code of Alabama, 1975. See Section 7-3-602, Code of Alabama, 1975, for the proposition that "no discharge of any party provided by this article is effective against a subsequent holder in due course unless he has notice thereof when he takes the instrument." See *FDIC v. McCullough*, 911 F.2d 592 (11th Cir. 1990), for the proposition that the FDIC is granted holder in due course status without regard to compliance with state law prerequisites for the same.

5. The Trial Court erred as a matter of law in this case by failing to apply the D'Oench Doctrine. The U.S. Supreme Court in *D'Oench Duhme and Company v. FDIC*, 315 U.S. 447, 62 S.Ct. 676, 86 L.Ed. 956 (1942), established a rule that has been expanded over the decades. The result of this federal doctrine is that the maker of a note is now precluded from asserting defenses to the enforcement of a note under any of various circumstances where the maker has participated in a scheme or arrangement likely to mislead bank examiners.

Because a promissory note is a negotiable instrument, the presence of an uncanceled bank note in a bank file leads bank examiners to the inescapable conclusion that the note is valid and unpaid. Even if Johnson was supposed to have been released from further liability on her

notes at the time of her husband's renewals, she participated in a scheme or arrangement likely to mislead bank examiners by failing to insist that the bank mark her notes paid and/or return the original instruments to her. The fact that each note signed by Amelia Johnson contained language allowing the renewal by a co-maker without relieving the other co-maker of any obligations under the notes, only underscores the above conclusion. The presence of the original notes in the bank file, each of which contain language permitting the note for one co-maker without discharging the other, was likely to mislead bank examiners into a belief that Amelia Johnson was still obligated. Thus, under D'Oench Duhme, Johnson's defense based on a renewal note executed solely by her former husband, is precluded and can not defeat her liability to Cadle on the notes.

6. Although it is difficult to determine the basis for the Trial Court's denial of Cadle's summary judgment motions, to the extent that the Trial Court based its ruling on weight it gave to speculative and conclusory allegations contained in various of the affidavits and testimony submitted by Amelia Johnson in defense of the summary judgment motions, the Trial Court committed legal error. Summary judgment is proper when the moving party makes a prima facie showing that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law, and where the non moving party fails to produce substantial evidence to show otherwise. Rule 56 Alabama Rules of Civil Procedure. Speculation and conclusory allegations are insufficient to create a genuine issue of material fact such as would preclude entry of summary judgment. *Tinsley v.*

Henderson, 613 So.2d 1268 (Ala. 1993). Any evidence offered in opposition or response to a motion for summary judgment in the form of affidavits or otherwise, must present facts that would be admissible at trial and must be based on personal knowledge. Speculation and subjective belief are not the equivalent of personal knowledge and do not satisfy the requirements. *Government Street Lumber Co., Inc. v. AmSouth Bank, N.A.*, 553 So.2d 68 (Ala. 1989).

Once Cadle showed it had possession of the original notes, Cadle met its burden of showing a prima facie case, and the burden then shifted to Johnson to present substantial evidence of a valid defense. Otherwise, summary judgment for Cadle was required. *Chilton v. City of Huntsville*, 584 So.2d 822 (Ala. 1991). An examination of the materials submitted by Johnson in opposition to Cadle's summary judgment motions reveals that much of her evidence was in a form inadmissible at trial, based on speculation and subjective belief. Additionally, the materials submitted by Johnson failed to present substantial evidence of any defense to overcome Cadle's prima facie case. Therefore, Cadle was entitled to summary judgment in the Trial Court as a matter of law.

C. CONCLUSION

A movant who conclusively establishes that a summary judgment is appropriate, with no *pertinent* opposition from the non-movant, is entitled to a judgment *as a matter of law*, and the judgment *shall be rendered* forthwith. Rule 56(c)(3), Alabama Rules of Civil Procedure; *Superskate, Inc. v. Nolen by Miller*, 641 So.2d 231 (Ala. 1994).

Prior to trial, Cadle conclusively established that summary judgment was and is appropriate. Cadle is therefore entitled to have the judgment against it reversed, and have summary judgment entered in its favor. *Superskate, Inc. v. Nolen by Miller*, 641 So.2d 231 (Ala. 1994).

WHEREFORE, Appellant, The Cadle Company, hereby moves this Honorable Court for a rehearing in the above referenced case and respectfully requests that this Court enter a new order reversing the decision of the Circuit Court of Escambia County, Alabama, and rendering judgment for Cadle on its claims against Johnson. Furthermore, Appellant would respectfully request that this Court issue a written opinion in this cause for the reasons stated above. Appellant incorporates into this brief and application for rehearing, the statement of facts contained in Cadle's Rule 39(k) motion submitted herewith, and further incorporates the statement of facts and legal arguments contained in the Brief for Appellant and Reply Brief previously filed in this Court by The Cadle Company. Finally, Cadle incorporates into this application for rehearing the record in this case in the Trial Court of Escambia County, Alabama, which record fully supports Cadle's arguments herein.

/s/ George B. Jones
GEORGE B. JONES
Attorney for Appellant,
The Cadle Company
204 S. Pensacola Avenue
P. O. Drawer 680
Atmore, Alabama 36504
(334) 368-9315

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served on the counsel listed below, by placing a copy of the same in regular U. S. mail, postage paid, this 30th day of AUGUST, 1996.

W. Beatty Pearson
Gaines C. McCorquodale
Michelle Hart
Attorneys for Appellee
Dempsey, Pearson, & Cummins
P. O. Box 980
Spanish Fort, Alabama 36527

Honorable John H. Wilkerson, Jr.
Clerk of the Court of Civil Appeals
300 Dexter Avenue
Montgomery, Alabama 36104-3741

/s/ George B. Jones
GEORGE B. JONES

BEST AVAILABLE COPY

STJ/aj R# 0900023326 & 0900023316

Larry W. Johnson and Amelia P. Johnson 207 West Oak St. Atmore, Ala. 36502 BORROWER'S NAME AND ADDRESS "I" includes each borrower above, jointly and severally.	FIRST STATE BANK OF ATMORE 207 NORTH MAIN STREET, BOX 1058 ATMORE, ALABAMA 36504 LENDER'S NAME AND ADDRESS "You" means the lender, its successors and assigns.	Loan Number 000233-34 Date ober 8, 1984 Maturity Date November 7, 1984 Loan Amount $ 12,000.00 Renewal Of

Note: I promise to pay to you, or your order, at your address above, the principal sum of: Twelve Thousand and no/100 Dollars $ 12,000.00

plus interest from October 8, 1984 at the rate of 13.5 % per year until paid in full

plus (if completed) an interest surcharge of $ _____

(a) ☐ on demand. (b) ☐ on demand, but if none is made, on _____, 19__ (c) ☒ on November 7, 1984

If (a), (b) or (c) is marked, I will pay accrued interest _____ and on the maturity date.

(d) ☐ In _____ installments of $ _____ each, beginning _____, 19__ and continuing on the same day of each ☐ month ☐ _____ thereafter, until _____, 19__ when a final payment of $ _____ will be due

(e) ☐ (other) _____

I will pay this amount as follows

PAYMENTS: Interest accrues on the unpaid balances of principal remaining from time to time. Each payment when made shall be applied first toward accrued interest and the balance to principal. The final payment may be more or less than the amount scheduled depending upon my payment record.

DELINQUENCY AND DEFAULT: I agree to pay a late charge equal to 5% of the amount of a payment which is 10 or more days late, but not less than $.50 and not more than $100.00. I also agree to pay in the event of my default the costs you incur to collect this note, plus, if the amount financed is more than $300.00, your reasonable attorney's fees of up to 15% of the unpaid debt if you refer collection of this note to an attorney who is not your salaried employee.

POST-MATURITY INTEREST: Interest will accrue at the maximum rate permitted by law on the balance of this note not paid at maturity, including maturity by acceleration.

PREPAYMENT: I may prepay this note in whole or in part at any time. However, any partial prepayment will not excuse any later scheduled payments until this note is paid in full. If an interest surcharge fee is listed above, upon prepayment in full by any means within 90 days of the date of this note, the interest surcharge fee will be prorated and refunded or credited to the balance of this note, except that in such event you may retain no less than $2.00. Otherwise, any interest surcharge will not be refunded.

WAIVER: With respect to this loan and any other debt I owe you, I waive all homestead and personal property exemptions provided by the constitution and law of the state of Alabama, except the statutory exemption from garnishment.

THE PURPOSE OF THIS LOAN IS: personal

ANNUAL PERCENTAGE RATE The cost of my credit as a yearly rate	FINANCE CHARGE The dollar amount the credit will cost me.	AMOUNT FINANCED The amount of credit provided to me or on my behalf.	TOTAL OF PAYMENTS The amount I will have paid when I have made all scheduled payments.
13.50 %	$ 133.15	$ 12,000.00	$ 12,133.15

I have the right to receive at this time an itemization of the Amount Financed

Luf ☐ I want an itemization

☐ NO - I do not want an itemization

My Payment Schedule will be:

Number of Payments	Amount of Payments	When Payments Are Due
1	$ 12,133.15	November 7, 1984
	$	
	$	
	$	

"e" means an estimate

$ _____ Filing Fees

$ _____ Non-filing Insurance

☐ Demand: ☐ This note has a demand feature. ☐ This note is payable on demand and all disclosures are based on an assumed maturity of one year.

Security: I am giving a security interest in: ☐ (brief description of other property)

☐ the goods or property being purchased.

☐ collateral securing other loans with you may also secure this loan.

☐ my deposit accounts and other rights to the payment of money from you.

Late Charge: ☐ I will pay a late charge equal to 5% of the amount of a payment which is 10 or more days late.

Prepayment: If I pay off this loan early, I ☐ may ☒ will not have to pay a penalty, and I ☐ may ☐ will not be entitled to a refund of part of the finance charge.

☐ Assumption: Someone buying my home ☐ may, subject to conditions, be allowed to ☐ cannot assume the remainder of the mortgage on the original terms.

I can see my contract documents for any additional information about nonpayment, default, any required repayment before the scheduled date, and prepayment refunds and penalties.

Insurance: Credit life insurance and credit disability insurance are not required to obtain credit, and will not be provided unless I sign and agree to pay the additional cost. I want:

Type	Premium	Term	Signatures (or Initials)
Credit Life			I want credit life insurance X _____ Name of Insured
Credit Disability			I want credit disability insurance X _____ Name of Insured
Joint Credit Life			I want joint credit life insurance X _____ Name of Insured _____ Name of Insured

I do not want: Luf Credit Life Ins.; _____ Credit Disability Ins.; _____ Joint Credit Life Ins.

Property Insurance: I may obtain property insurance from anyone I want that is acceptable to you. If I get the insurance from or through you I will pay $ _____ for _____ of coverage.

Single Interest Insurance: I may obtain single interest insurance from anyone I want that is acceptable to you. If I get the insurance from or through you I will pay $ _____ for _____ of coverage.

Itemization of Amount Financed

Amount given to me directly	$ _____	(a)
Amount paid on my account	$ 12,000.00	(b)
Amounts paid to others on my behalf:		
To Property Insurance Company	$ _____	(c)
To Credit Life Insurance Company	$ _____	(d)
To Disability Insurance Company	$ _____	(e)
To Public Officials	$ _____	(f)
_____	$ _____	(g)
_____	$ _____	(h)
Prepaid Finance Charge	$ _____	(i)
AMOUNT FINANCED (a through h - i)	$ 12,000.00	(j)
Finance Charge (include prepaid)	$ 133.15	(k)
Total of Payments (j + k)	$ 12,133.15	(l)

Security - To secure the payment of the note total (defined on the reverse side)

(1) I acknowledge and agree that you have the right to set-off this note against any obligation you have (now or hereafter) to pay money to me.

(2) You may collect the proceeds (or rebates of unearned premiums) on any insurance policy insuring me (where you are named as loss payee) and on any policy insuring the property securing this note. You will apply that toward what I owe you.

(3) ☒ If checked, this note is not further secured by any contemporaneous agreement (other than (1) and (2) of this section).

(4) ☐ If checked, this note is secured by a separate _____ dated _____

(5) ☐ Security Agreement - If checked, I give you a security interest in the property described below. The rights I am giving you in this property, and the obligations this agreement secures are defined on the reverse side of this form.

This collateral will be used for personal purposes

☐ If checked, this is a purchase money loan. You may include the name of the seller on the check or draft for this loan.

Assumptions - Unless specifically agreed in writing to the contrary, this security agreement and any loan it secures cannot be assumed by any person who buys the collateral described above from me, and I understand and agree that if I attempt to transfer any interest in this collateral (including, but not limited to, possession) I will be in default on all secured obligations.

Signatures and Seals: In witness whereof, I have signed my name and affixed my seal on this 8th day of October, 19 84. By doing so, I agree to the terms of this note and security agreement (including those on the reverse side of this form) and acknowledge receipt of at least one copy on today's date.

Any person who signs within this enclosure does so to give you a security interest in the property described above, but assumes no personal obligation to pay this note.

Name _____

X _____ (SEAL) Date _____

Disposition of Funds: _____ Deposited to Account Number _____ Check Number

CAUTION - IT IS IMPORTANT THAT YOU THOROUGHLY READ THIS CONTRACT BEFORE YOU SIGN IT.

Signature Luf (SEAL)

☐ If checked, the signature below was required as a condition of credit.

Signature Amelia P. Johnson (SEAL)

☐ If checked, the signature below was required as a condition of credit.

Signature _____ (SEAL)

SIMPLE INTEREST NOTE, DISCLOSURE, AND SECURITY AGREEMENT.

© 1981 BANKERS SYSTEMS, INC., ST. CLOUD, MN 56301 FORM NOBS-SI-AL 3/20/83

CK103

ADDITIONAL T[illegible] OF THE NOTE

The following terms apply to this not[illegible]ether or not it is secured by the security agreement which begins on the other side of this form (paragraph 5 in the Security section).

Definitions - "I" means each borrower who signs this note. "I" also means each other person and legal entity who by this or separate agreement promises to pay it. This includes guarantors, endorsers and sureties.

The term "note total" means the total sum agreed to be paid on this note. It includes the amount financed and the finance charge. It also includes all additional sums payable including any late payment charges, post-maturity interest, required insurance premiums, costs of collection, attorneys' fees, and costs of repossession, preservation, repairs, taxes, and sale of any property securing this note.

Applicable Law - I agree this note will be governed by the law of the state where you are located, especially the Uniform Commercial Code. The terms of any agreement securing the payment of this note may also be governed by the law of the state where the property is located.

Any term of this note (and security agreement) which does not comply with applicable law will not be effective if that law does not expressly or impliedly permit variations by agreement. If any part of this note or security agreement cannot be enforced according to its terms, this fact will not affect the balance of this note and security agreement.

Set-Off - I acknowledge and agree that you may set-off all or any part of the note total against any obligation you may have, now or hereafter to pay money to me. This includes:

(a) any deposit account balance I have with you, whether time, savings, checking or NOW account; and
(b) any money owing to me on an item presented to you or in your possession for collection or exchange; and
(c) a repurchase agreement or any other non-deposit obligation.

If my right to receive money from you is also owned by some other person who has not agreed to pay this note (such as another depositor on a joint account) your right of set-off will extend to the amount of money which could be withdrawn or paid directly to me on my request or endorsement alone. In addition, (where I may obtain payment from you only with the endorsement or consent of someone who has not agreed to pay this note) your right of set-off will extend to my interest in the obligation.

Your right of set-off will not apply to an account or other obligation if it clearly appears that my rights in the obligation are solely as a fiduciary for another, or to an account which, by its nature and applicable law (for example an IRA or other tax deferred retirement account) must be exempt from the claims of creditors.

Your right of set-off may be exercised upon my default (except when prohibited by law):

(a) without prior demand or notice; and
(b) without regard to the existence or value of any property securing this note; and
(c) without regard to the number or credit-worthiness of any other persons who have agreed to pay this note.

You will not be liable for wrongful dishonor of a check or other request for payment where there is insufficient funds in the account (or other obligation) to pay such request arising as a result of your exercise of this right of set-off. I agree to hold you harmless from the claims of any person arising as the result of your exercise of this right.

Default - I will be in default on this note if any one or more of the following occurs:

(a) I fail to make a payment on this note in full when due;
(b) I fail to make a payment in full when due on any other debt I owe you;
(c) I die or am declared incompetent;
(d) I fail generally to pay my debts as they become due;
(e) I fail to keep any other promise contained in this note, any other note, any other written agreement with you, including any security agreement;
(f) any statement of fact made on an application for credit or any other written agreement with you appears to be untrue at the time it was made;
(g) any other creditor attempts, with or without legal process, to gain possession or control of any money or property of mine;
(h) I transfer a significant part of my money or property;
(i) I file for relief from my debts (or an application is filed against me for involuntary relief) under the United States Bankruptcy Code;
(j) in addition to the above, if a legal entity such as a partnership or corporation agrees to pay this note, if that entity merges, dissolves, reorganizes, terminates its business or existence, or if a partner or majority stockholder dies or is declared incompetent;
(k) if a fact appears or any event occurs which causes you to consider yourself insecure.

If an event of default occurs as to any one of us, you may exercise your remedies against any or all of us.

Remedies - If I am in default on this note, you may:

(a) accelerate the due date of the note total, making all sums immediately due;
(b) exercise your right of set-off;
(c) demand additional security or parties obligated to pay this note (or both) as a condition of waiving, for any period of time, any other remedy you may have under the law and this agreement;
(d) exercise any remedy you may have under state or federal law for collection of this note;
(e) exercise any additional right given to you under any agreement securing the payment of this note.

By electing any one or more of the remedies above, you do not waive your right to later elect any other remedy until this note is paid in full. If you do not elect any remedy upon an event of default, you do not thereby waive your right to later consider the event as a default if it continues or recurs.

Other Security - I agree that any present or future agreement securing any other debt I owe you will also secure the payment of this note.

However, an agreement securing any other debt will not secure this note if either of the following applies:

(a) you fail to make a disclosure required by law of the existence of such other security agreement; or
(b) you fail to provide (to any person entitled) any notice of right of rescission required by law for this transaction.

Obligations Independent - I understand that my obligation to pay this note is independent of the obligation of any other person who has also agreed to pay it. You may release any of us, release any security, waive any right you might have against any of us, extend new credit to any of us, renew this note, or all of the above, without affecting my obligation to pay in [illegible] amount.

Waiver - I [illegible] (to the extent permitted by law) certain rights I might otherwise have. These include demand, presentment, protest, notice of dishonor, and notice of protest.

Guarantee - By signing (including my seal) below I unconditionally guarantee the payment of the note total (as defined in the note). I also agree that all the other terms of the note will apply to me.

CAUTION - IT IS IMPORTANT THAT YOU THOROUGHLY READ THIS CONTRACT BEFORE YOU SIGN IT.

NAME _____

X _____ (SEAL)

NAME _____

X _____ (SEAL)

_____ (Initial) I do not claim any interest in the property listed in the security agreement. However, my guarantee of payment of the note total includes any amounts agreed to be paid under the terms of the security agreement.

_____ (Initial) I do claim an interest in the prop[illegible]d in the security agreement. The terms of the security agreement will also apply to me.

ADDITION[illegible] TERMS OF SECURITY AGREEMENT

The following terms will [illegible] of the security agreement which begins on the front side of this form (paragraph 5 of t[illegible]ecurity section).

Property - When used in this agreement, the term property means and includes:

(a) all of my property specifically listed and, if a general description is used (whether or not any specific property is listed), in all of my property fitting the general description; and,
(b) all benefits which arise from the described property, including cash or non-cash proceeds, insurance benefits, interest, dividends, stock splits, and voting rights; and,
(c) any property which is now or hereafter becomes attached to, a part of, or results from the described property.

Ownership and Duties Toward Property - By giving you this security interest, I represent and agree:

(a) I own all of the property, free of any claim by any other person, and I will defend it against any other claim.
(b) The security interest I am giving you in this property has first priority over the claim of any other of my general or secured creditors. I have signed or immediately will sign any additional documents or provide you with any additional information you may require to perfect and preserve your first priority in this property. I will not hereafter do anything to defeat your position.
(c) I will keep the property in my possession (except for pledged property delivered to you), in good condition and repair, and use it only for the lawful purposes for which it was intended. Unless otherwise agreed in writing, the property will be located at my address listed on the front side of this form.
(d) I will not attempt to sell the property (unless it is inventory and identified as such) or otherwise transfer any rights in this property to anyone else. I will not permit the property to become attached to any real estate without first providing you an opportunity to preserve your first priority status.
(e) I will pay all taxes and assessments on the property as they become due.
(f) I will provide you reasonable access to the property for the purpose of inspection and notify you of any loss or damage.

Insurance — I agree to purchase insurance on the property against such risks and in such amounts as you may reasonably require. In addition, I agree as follows:

(a) I will arrange for you to be named as loss payee on any such policy so that any benefits arising from the insured risks will first be paid to you for application toward the secured obligations.
(b) I agree that you may, in the event of a loss, require additional security or assurances of payment of the secured obligations as a condition of permitting any insurance benefits to be used for repair or replacement of the property.
(c) I agree to purchase insurance from a company which is authorized to do business in this state and which is reasonably acceptable to you.
(d) I will maintain this insurance until all the secured obligations are paid in full.
(e) If I fail to obtain or maintain this insurance, or I fail to arrange for you to be named as loss payee, you may (but in no event are required to) purchase such insurance which will secure only your interest in the property. I agree to pay the cost of such insurance upon demand, plus interest from the date purchased at the highest contract rate permitted by law until paid in full.

Secured Obligations - This security interest will secure the payment of the note total (as defined in the note). It will also secure (except as provided in the next paragraph) any other debt I owe you now or hereafter. This security interest will survive even if there are no debts owed to you until this security interest is formally discharged in writing.

However, this security interest will not secure some other debt if a disclosure must be made with respect to such debt of the existence of this security interest and such disclosure is not given as required by law. This security interest also will not secure any other debt if any person is entitled to a notice of the right to rescind such debt unless the notice is given as provided by law.

The previous two paragraphs define what is meant by the term "secured obligations" in this agreement.

Remedies - If I am in default on any of the secured obligations you have all the remedies provided under this security agreement and by law. These remedies are in addition to any provided in the note or other obligation, and include (among others):

(a) If my default consists of failure to pay taxes, assessments or other liens, you may pay these yourself. You are not required to, however. If you do, the amount you pay will be added to the secured obligations, will be immediately due, and will accrue interest at the highest contract rate permitted by law until paid in full. (This is in addition to any other remedy you may elect.)
(b) You may require me to assemble the property and make it available to you at a place you designate which is reasonably convenient to both you and me.
(c) You may take immediate possession of the property, with or without legal process, sell it, and apply the proceeds as provided by law to your expenses and then toward the secured obligations. Expenses include your costs of repossession, attorneys' fees (where permitted), repairs (if necessary) and costs of sale.
(d) You will be entitled to a deficiency judgment if the proceeds of sale do not pay all the secured obligations (except where prohibited by law).
(e) You may also be entitled to keep the property in satisfaction of the secured obligations in certain circumstances.

I also agree that if any notice is required to be given to me of your intended sale or disposition of the property, notice will be considered commercially reasonable if provided by first class mail addressed to me at the address listed on the front side of this form mailed 10 days before the date of intended disposition.

Pledges - Property which is described on the other side of this form as "pledged" is property which I am delivering to your possession to secure the payment of the secured obligations. You have the right to retain possession of this property until the secured obligations are paid in full. All other terms of this note and security agreement also apply to this property.

In particular (without intending to limit these provisions only to pledged property):

(a) You must use reasonable care in the custody and preservation of this property. However, you are not required to preserve any rights I may have against any prior parties to this property.
(b) I agree to pay any additional costs you incur for the custody, preservation and enforcement of any rights in this property.
(c) You may hold any increase or profits from this property as additional security, though money must be applied toward payment of the secured obligations.
(d) You may arrange for yourself or your nominee to be shown as owner of the property, inform any prior party to make any payments on the property directly to you, and repledge the property upon terms which do not affect my right to redeem it.
(e) The risk of accidental loss or damage is on me to the extent of any deficiency in effective insurance coverage.
(f) You are not responsible for any decline in value of the property while it remains in your possession.

Filing - A carbon, photographic or other reproduction of this security agreement may be used as a financing statement where permitted by law.

PAY TO THE ORDER OF
THE CADLE COMPANY
Without Recourse
By: _____

Insert FTC Notice if Applicable

Attorney-in-Fact for Federal Deposit Insurance Corporation in its Corporate capacity as successor in interest to

FIRST STATE BANK OF ATWATER

App. 43

CR104

Larry W. Johnson and Amelia P. Johnson
207 W. Oak St.
Atmore, Ala. 36502

BORROWER'S NAME AND ADDRESS
"I" includes each borrower above, jointly and severally.

FIRST STATE BANK OF ATMORE
207 NORTH MAIN STREET, BOX 1058
ATMORE, ALABAMA 36504

LENDER'S NAME AND ADDRESS
"You" means the lender, its successors and assigns.

Loan Number 09.000-233-26
Date June 18, 19 84
Maturity Sept. 5, 19 84
Loan Amount $ 2000.00
Renewal Of

Note: I promise to pay to you, or your order, at your address above, the principal sum of:
Two Thousand and no/100 ---------- Dollars $ 2000.00
plus interest from ____ at the rate of ____ % per year until ____
plus (if completed) an interest surcharge of $ ____
I will pay this amount as follows:
(a) ☐ on demand., (b) ☐ on demand, but if none is made, on ____, 19__ (c) ☒ on Sept. 5, 1984
If (a), (b) or (c) is marked, I will pay accrued interest ____ and on the maturity date.
(d) ☐ in ____ installments of $ ____ each, beginning ____, 19__ and continuing on the same day of each ☐ month
☐ ____ thereafter, until ____, 19__ when a final payment of $ ____ will be due
(e) ☐ (other) ____

PAYMENTS: Interest accrues on the unpaid balances of principal remaining from time to time. Each payment when made shall be applied first toward accrued interest and the balance to principal. The final payment may be more or less than the amount scheduled depending upon my payment record.

DELINQUENCY AND DEFAULT: I agree to pay a late charge equal to 5% of the amount of a payment which is 10 or more days late, but not less than $ .50 and not more than $100.00. I also agree to pay in the event of my default the costs you incur to collect this note, plus, if the amount financed is more than $300.00, your reasonable attorney's fees of up to 15% of the unpaid debt if you refer collection of this note to an attorney who is not your salaried employee.

POST-MATURITY INTEREST: Interest will accrue at the maximum rate permitted by law on the balance of this note not paid at maturity, including maturity by acceleration.

PREPAYMENT: I may prepay this note in whole or in part at any time. However, any partial prepayment will not excuse any later scheduled payments until this note is paid in full. If an interest surcharge fee is listed above, upon prepayment in full by any means within 90 days of the date of this note, the interest surcharge fee will be prorated and refunded or credited to the balance of this note, except that in such event you may retain no less than $2.00. Otherwise, any interest surcharge will not be refunded.

WAIVER: With respect to this loan and any other debt I owe you, I waive all homestead and personal property exemptions provided by the constitution and law of the state of Alabama, except the statutory exemption from garnishment.

THE PURPOSE OF THIS LOAN IS personal.

ANNUAL PERCENTAGE RATE The cost of my credit as a yearly rate.	FINANCE CHARGE The dollar amount the credit will cost me.	AMOUNT FINANCED The amount of credit provided to me or on my behalf.	TOTAL OF PAYMENTS The amount I will have paid when I have made all scheduled payments.
12.00 %	$ 51.95	$ 2000.00	$ 2051.95

I have the right to receive at this time an itemization of the Amount Financed.
X ____ YES - I want an itemization
____ NO - I do not want an itemization

My Payment Schedule will be:

Number of Payments	Amount of Payments	When Payments Are Due
1	$ 2051.95	September 5, 1984
	$	
	$	
	$	

"e" means an estimate
$ ____ Filing Fees
$ ____ Non-filing Insurance

☐ Demand: ☐ This note has a demand feature. ☐ This note is payable on demand and all disclosures are based on an assumed maturity of one year.

Security: I am giving a security interest in:
☐ (brief description of other property)
☐ the goods or property being purchased.
☐ collateral securing other loans with you may also secure this loan.
☐ my deposit accounts and other rights to the payment of money from you.

Late Charge: ☒ I will pay a late charge equal to 5% of the amount of a payment which is 10 or more days late.

Prepayment: If I pay off this loan early, I ☐ may ☒ will not have to pay a penalty, and I ☒ may ☐ will not be entitled to a refund of part of the finance charge.

☐ Assumption: Someone buying my home ☐ may, subject to conditions, be allowed to ☐ cannot assume the remainder of the mortgage on the original terms.

I can see my contract documents for any additional information about nonpayment, default, any required repayment before the scheduled date, and prepayment refunds and penalties.

Insurance: Credit life insurance and credit disability insurance are not required to obtain credit, and will not be provided unless I sign and agree to pay the additional cost.

Type	Premium	Term	Signatures (or Initials)
Credit Life			I want credit life insurance. X ____ Name of Insured
Credit Disability			I want credit disability insurance. X ____ Name of Insured
Joint Credit Life			I want joint credit life insurance. X ____ Name of Insured ____ Name of Insured

I do not want ☒ Credit Life Ins.; ____ Credit Disability Ins.; ____ Joint Credit Life Ins.

Property Insurance: I may obtain property insurance from anyone I want that is acceptable to you. If I get insurance from or through you I will pay $ ____ for ____ of coverage.

Single Interest Insurance: I may obtain single interest insurance from anyone I want that is acceptable to you. If I get the insurance from or through you I will pay $ ____ for ____ of coverage.

Itemization of Amount Financed

Amount given to me directly	$ 2000.00	(a)
Amount paid on my account	$	(b)
Amounts paid to others on my behalf:		
To Property Insurance Company	$	(c)
To Credit Life Insurance Company	$	(d)
To Disability Insurance Company	$	(e)
To Public Officials	$	(f)
	$	(g)
	$	(h)
Prepaid Finance Charge	$	(i)
AMOUNT FINANCED (a through h - i)	$ 2000.00	(j)
Finance Charge (include prepaid)	$ 51.95	(k)
Total of Payments (j + k)	$ 2051.95	(l)

Security - To secure the payment of the note here (defined on the reverse side):
(1) I acknowledge and agree that you have the right to set-off this note against any obligation you have (now or hereafter) to pay me, or to me.
(2) You may collect the proceeds (or rebates of unearned premiums) on any insurance policy insuring me who're you are named as loss payee and on any policy insuring the property securing this note. You will apply this toward what I owe you.
(3) ☐ If checked, this note is not further secured by any contemporaneous agreement (other than (1) and (2) of this section).
(4) ☐ If checked, this note is secured by a separate ____ dated ____.
(5) ☐ Security Agreement - If checked, I give you a security interest in the property described below. The rights I am giving you in this property, and the obligations this agreement secures are defined on the reverse side of this form.

This collateral will be used for personal purposes.
☐ If checked, this is a purchase money loan. You may include the name of the seller on the check or draft for this loan.

Assumptions - Unless specifically agreed in writing to the contrary, this security agreement and any loan it secures cannot be assumed by any person who buys the collateral described above from me, and I understand and agree that if I attempt to transfer any interest in this collateral (including, but not limited to, possession) I will be in default on all secured obligations.

Signatures and Seals: In witness whereof, I have signed my name and affixed my seal on this 18th day of June, 19 84. By doing so, I agree to the terms of this note and security agreement (including those on the reverse side of this form) and acknowledge receipt of at least one copy on today's date.

Any person who signs within this enclosure does so to give you a security interest in the property described above, but assumes no personal obligation to pay this note.

Name ____
X ____ (SEAL) Date ____

Disposition of Funds:
Deposited to Account Number ____ Check Number ____

CAUTION - IT IS IMPORTANT THAT YOU THOROUGHLY READ THIS CONTRACT BEFORE YOU SIGN IT.

Borrower
Signature Larry W. Johnson (SEAL)
☐ If checked, the signature below was required as a condition of credit.
Signature Amelia P. Johnson (SEAL)
☐ If checked, the signature below was required as a condition of credit.
Signature ____ (SEAL)

SIMPLE INTEREST NOTE, DISCLOSURE, AND SECURITY AGREEMENT.
©1981 BANKERS SYSTEMS, INC., ST. CLOUD, MN 56301 FORM NOSS-SI-AL 5/20/83

App. 44

BEST AVAILABLE COPY

CR105

App. 45

ADDITIONAL TERMS — THE NOTE

The following terms apply to this note whether or not it is secured by the security agreement which begins on the other side of this form (paragraph 5 in the Security section).

Definitions - "I" means each borrower who signs this note. "I" also means each other person and legal entity who by this or separate agreement promises to pay it. This includes guarantors, endorsers and sureties.

The term "note total" means the total sum agreed to be paid on this note. It includes the amount financed and the finance charge. It also includes all additional sums payable including any late payment charges, post-maturity interest, required insurance premiums, costs of collection, attorneys' fees, and costs of repossession, preservation, repairs, taxes, and sale of any property securing this note.

Applicable Law - I agree this note will be governed by the law of the state where you are located, especially the Uniform Commercial Code. The terms of any agreement securing the payment of this note may also be governed by the law of the state where the property is located.

Any term of this note (and security agreement) which does not comply with applicable law will not be effective if that law does not expressly or impliedly permit variations by agreement. If any part of this note or security agreement cannot be enforced according to its terms, this fact will not affect the balance of this note and security agreement.

Set-Off - I acknowledge and agree that you may set-off all or any part of the note total against any obligation you may have, now or hereafter to pay money to me. This includes:

(a) any deposit account balance I have with you whether time, savings, checking or NOW account, and

(b) any money owing to me on an item presented to you or in your possession for collection or exchange, and

(c) a repurchase agreement or any other non-deposit obligation.

If my right to receive money from you is also owned by some other person who has not agreed to pay this note (such as another depositor on a joint account) your right of set-off will extend to the amount of money which could be withdrawn or paid directly to me on my request or endorsement alone. In addition, (where I may obtain payment from you only with the endorsement or consent of someone who has not agreed to pay this note) your right of set-off will extend to my interest in the obligation.

Your right of set-off will not apply to an account or other obligation if it clearly appears that my rights in the obligation are solely as a fiduciary for another, or to an account which, by its nature and applicable law (for example an IRA or other tax deferred retirement account), must be exempt from the claims of creditors.

Your right of set-off may be exercised upon my default (except when prohibited by law):

(a) without prior demand or notice, and

(b) without regard to the existence or value of any property securing this note, and

(c) without regard to the number or credit-worthiness of any other persons who have agreed to pay this note.

You will not be liable for wrongful dishonor of a check or other request for payment where there is insufficient funds in the account for other obligations) to pay such request arising as a result of your exercise of this right of set-off. I agree to hold you harmless from the claims of any person arising as the result of your exercise of this right.

Default - I will be in default on this note if any one or more of the following occurs:

(a) I fail to make a payment on this note in full when due,

(b) I fail to make a payment in full when due on any other debt I owe you,

(c) I die or am declared incompetent,

(d) I fail generally to pay my debts as they become due,

(e) I fail to keep any other promise contained in this note, any other note, any other written agreement with you, including any security agreement,

(f) any statements of fact made on an application for credit or any other written agreement with you appears to be untrue at the time it was made,

(g) any other creditor attempts, with or without legal process, to gain possession or control of any money or property of mine,

(h) I transfer a significant part of my money or property,

(i) I file for relief from my debts (or an application is filed against me for involuntary relief) under the United States Bankruptcy Code,

(j) in addition to the above, if a legal entity such as a partnership or corporation agrees to pay this note, if that entity merges, dissolves, reorganizes, terminates its business or existence, or if a partner or majority stockholder dies or is declared incompetent,

(k) if a fact appears or any event occurs which causes you to consider yourself insecure.

If an event of default occurs as to any one of us, you may exercise your remedies against any or all of us.

Remedies - If I am in default on this note, you may:

(a) accelerate the due date of the note total, making all sums immediately due,

(b) exercise your rights of set-off,

(c) demand additional security or parties obligated to pay this note (or both) as a condition of waiving, for any period of time, any other remedy you may have under the law and this agreement,

(d) exercise any remedy you may have under state or federal law for collection of this note,

(e) exercise any additional right given to you under any agreement securing the payment of this note.

By electing any one or more of the remedies above, you do not waive your right to later elect any other remedy until this note is paid in full. If you do not elect any remedy upon an event of default, you do not thereby waive your right to later consider the event as a default if it continues or recurs.

Other Security - I agree that any present or future agreement securing any other debt I owe you will also secure the payment of this note.

However, an agreement securing any other debt will not secure this note if either of the following applies:

(a) you fail to make a disclosure required by law of the existence of such other security agreement, or

(b) you fail to provide (to any person entitled) any notice of right of rescission required by law for this transaction.

Obligations Independent - I understand that my obligation to pay this note is independent of the obligation of any other person who has also agreed to pay it. You may release any of us, release any security, waive any right you might have against any of us, extend new credit to any of us (renew this note, in all of the above without affecting my obligation to pay the loan amount).

Waiver - I waive (to the extent permitted by law) certain rights I might otherwise have. These include demand, presentment, protest, notice of dishonor, and notice of protest.

Guarantee - By signing (including my seal) below I unconditionally guarantee the payment of the note total (as defined in the note). I also agree that all the other terms of the note will apply to me.

CAUTION - IT IS IMPORTANT THAT YOU THOROUGHLY READ THIS CONTRACT BEFORE YOU SIGN IT.

NAME _____

X _____ (SEAL)

NAME _____

X _____ (SEAL)

_____ (initial) I do not claim any interest in the property listed in the security agreement. However, my guarantee of payment of the note total includes any amounts agreed to be paid under the terms of the security agreement.

_____ (initial) I do claim an interest in the property listed in the security agreement and the terms of the security agreement will also apply to me.

ADDITIONAL TERMS OF SECURITY AGREEMENT

The following terms will apply to the security agreement which begins on the front side of this form (paragraph 5 of the Security section).

Property - When used in this agreement, the term property means and includes:

(a) all of my property specifically listed and, if a general description is used (whether or not any specific property is listed), in all of my property fitting the general description, and,

(b) all benefits which arise from the described property, including cash or non-cash proceeds, insurance benefits, interest, dividends, stock splits, and voting rights, and,

(c) any property which is now or hereafter becomes attached to, a part of, or results from the described property.

Ownership and Duties Toward Property - By giving you this security interest, I represent and agree:

(a) I own all of the property, free of any claim by any other person, and I will defend it against any other claim.

(b) The security interest I am giving you in this property has first priority over the claim of any other of my general or secured creditors. I have signed or immediately will sign any additional documents or provide you with any additional information you may require to perfect and preserve your first priority in this property. I will not hereafter do anything to defeat your position.

(c) I will keep the property in my possession (except for pledged property delivered to you), in good condition and repair, and use it only for the lawful purposes for which it was intended. Unless otherwise agreed in writing, the property will be located at my address listed on the front side of this form.

(d) I will not attempt to sell the property (unless it is inventory and identified as such) or otherwise transfer any rights in this property to anyone else. I will not permit the property to become attached to any real estate without first providing you an opportunity to preserve your first priority status.

(e) I will pay all taxes and assessments on the property as they become due.

(f) I will provide you reasonable access to the property for the purpose of inspection and notify you of any loss or damage.

Insurance — I agree to purchase insurance on the property against such risks and in such amounts as you may reasonably require. In addition, I agree as follows:

(a) I will arrange for you to be named as loss payee on any such policy so that any benefits arising from the insured risks will first be paid to you for application toward the secured obligations.

(b) I agree that you may, in the event of a loss, require additional security or assurance of payment of the secured obligations as a condition of permitting any insurance benefits to be used for repair or replacement of the property.

(c) I agree to purchase insurance from a company which is authorized to do business in this state and which is reasonably acceptable to you.

(d) I will maintain this insurance until all the secured obligations are paid in full.

(e) If I fail to obtain or maintain this insurance, or I fail to arrange for you to be named as loss payee, you may (but in no event are required to) purchase such insurance which will secure only your interest in the property. I agree to pay the cost of such insurance upon demand, plus interest from the date purchased at the highest contract rate permitted by law until paid in full.

Secured Obligations - This security interest will secure the payment of the note total (as defined in the note). It will also secure (except as provided in the next paragraph) any other debt I owe you now or hereafter. This security interest will survive even if there are no debts owed to you until this security interest is formally discharged in writing.

However, this security interest will not secure some other debt if a disclosure must be made with respect to such debt of the existence of this security interest and such disclosure is not given as required by law. This security interest also will not secure any other debt if any person is entitled to a notice of the right to rescind such debt unless the notice is given as provided by law.

The previous two paragraphs define what is meant by the term "secured obligations" in this agreement.

Remedies - If I am in default on any of the secured obligations you have all the remedies provided under this security agreement and by law. These remedies are in addition to any provided in the note or other obligation, and include (among others):

(a) If my default consists of failure to pay taxes, assessments or other liens, you may pay these yourself. You are not required to, however. If you do, the amount you pay will be added to the secured obligations, will be immediately due, and will accrue interest at the highest contract rate permitted by law until paid in full. (This is in addition to any other remedy you may elect.)

(b) You may require me to assemble the property and make it available to you at a place you designate which is reasonably convenient to both you and me.

(c) You may take immediate possession of the property, with or without legal process, sell it, and apply the proceeds as provided by law to your expenses and then toward the secured obligations. Expenses include your costs of repossession, attorneys' fees (where permitted), repairs (if necessary) and costs of sale.

(d) You will be entitled to a deficiency judgment if the proceeds of sale do not pay all the secured obligations (except where prohibited by law).

(e) You may also be entitled to keep the property in satisfaction of the secured obligations in certain circumstances.

I also agree that if any notice is required to be given to me of your intended sale or disposition of the property, notice will be considered commercially reasonable if provided by first class mail addressed to me at the address listed on the front side of this form mailed 10 days before the date of intended disposition.

Pledges - Property which is described on the other side of this form as "pledged" is property which I am delivering to your possession to secure the payment of the secured obligations. You have the right to retain possession of this property until the secured obligations are paid in full. All other terms of this security agreement also apply to this property.

In particular (without intending to limit these provisions with respect to pledged property):

(a) You must use reasonable care in the custody and preservation of this property; however, you are not required to protect any rights I may have against any prior parties to this property.

(b) I agree to pay any additional costs you incur for the custody, preservation and enforcement of any rights in this property.

(c) You may hold any increase or profits from this property as additional security (though money must be applied toward payment of the secured obligations).

(d) You may arrange for yourself or your nominee to be shown as the owner of the property on the books of any corporation, inform any prior party to make any payments on it directly to you, and repledge the property upon terms which do not affect my rights to redeem it.

(e) The risk of accidental loss or damage is on me to the extent of any deficiency in effective insurance coverage.

(f) You are not responsible for any decline in value of the property while it remains in your possession.

Filing - A carbon, photographic or other reproduction of this security agreement may be used as a financing statement where permitted by law.

PAY TO THE ORDER OF
THE CALLE COMPANY
Without Recourse
By: _____

Insert FTC Notice if Applicable

Attorney-in-fact for Federal Deposit Insurance Corporation in its Corporate capacity as successor in interest to
FIRST STATE BANK OF ATMORE

CR106

STJ/aj

BORROWER'S NAME AND ADDRESS "I" includes each borrower above, jointly and severally.	LENDER'S NAME AND ADDRESS "You" means the lender, its successors and assigns.	
Larry W. Johnson and Amelia F. Johnson c/o First State Bank of Atmc	FIRST STATE BANK OF ATMORE 207 NORTH MAIN STREET, BOX 1058 ATMORE, ALABAMA 36504	Loan No. 09-000-233-18 Date rch 9, 19 84 Maturity Date Sept. 5, 19 84 Loan Amount $ 10,000.00 Renewal Of

Note: I promise to pay to you, or your order, at your address above, the principal sum of Ten Thousand and no/100 Dollars $ 10,000.00

plus interest from March 9, 1984 at the rate of 10.0 % per year until paid in full

plus (if completed) an interest surcharge of $ _____

I will pay this amount as follows:

(a) ☐ on demand. (b) ☐ on demand, but if none is made, on _____, 19__. (c) ☒ on Sept. 5, 1984

If (a), (b) or (c) is marked, I will pay accrued interest _____ and on the maturity date

(d) ☐ in _____ installments of $ _____ each, beginning _____, 19__ and continuing on the same day of each ☐ month

☐ _____ thereafter, until _____, 19__ when a final payment of $ _____ will be due

(e) ☐ (other) _____

PAYMENTS: Interest accrues on the unpaid balances of principal remaining from time to time. Each payment when made shall be applied first toward accrued interest and the balance to principal. The final payment may be more or less than the amount scheduled depending upon my payment record.

DELINQUENCY AND DEFAULT: I agree to pay a late charge equal to 5% of the amount of a payment which is 10 or more days late, but not less than $ 50 and not more than $ 100.00. I also agree to pay in the event of my default the costs you incur to collect this note, plus, if the amount financed is more than $300.00, your reasonable attorney's fees of up to 15% of the unpaid debt if you refer collection of this note to an attorney who is not your salaried employee.

POST-MATURITY INTEREST: Interest will accrue at the maximum rate permitted by law on the balance of this note not paid at maturity, including maturity by acceleration.

PREPAYMENT: I may prepay this note in whole or in part at any time. However, any partial prepayment will not excuse any later scheduled payments until this note is paid in full. If an interest surcharge fee is listed above, upon prepayment in full by any means within 90 days of the date of this note, the interest surcharge fee will be prorated and refunded or credited to the balance of this note, except that in such event you may retain no less than $2.00. Otherwise, any interest surcharge will not be refunded.

WAIVER: With respect to this loan and any other debt I owe you, I waive all homestead and personal property exemptions provided by the constitution and law of the state of Alabama, except the statutory exemption from garnishment.

THE PURPOSE OF THIS LOAN IS: personal

ANNUAL PERCENTAGE RATE The cost of my credit as a yearly rate	FINANCE CHARGE The dollar amount the credit will cost me	AMOUNT FINANCED The amount of credit provided to me or on my behalf	TOTAL OF PAYMENTS The amount I will have paid when I have made all scheduled payments
10.00 %	$ 493.15	$ 10,000.00	$ 10,493.15

I have the right to receive at this time an itemization of the Amount Financed.
X YES - I want an itemization
_____ NO - I do not want an itemization

My Payment Schedule will be:

Number of Payments	Amount of Payments	When Payments Are Due
1	$ 10,493.15	September 5, 1984
	$	
	$	
	$	

"e" means an estimate

$ _____ Filing Fees
$ _____ Non-filing Insurance

☐ **Demand.** ☐ This note has a demand feature. ☐ This note is payable on demand and all disclosures are based on an assumed maturity of one year.

Security: I am giving a security interest in:
☐ (brief description of other property)
☐ the goods or property being purchased.
☐ collateral securing other loans with you may also secure this loan.
☐ my deposit accounts and other rights to the payment of money from you.

Late Charge: ☒ I will pay a late charge equal to 5% of the amount of a payment which is 10 or more days late.

Prepayment: If I pay off this loan early, I ☐ may ☒ will not have to pay a penalty, and I ☒ may ☐ will not be entitled to a refund of part of the finance charge.

☐ **Assumption:** Someone buying my home ☐ may, subject to conditions, be allowed to ☐ cannot assume the remainder of the mortgage on the original terms.

I can see my contract documents for any additional information about nonpayment, default, any required repayment before the scheduled date, and prepayment refunds and penalties.

Insurance: Credit life insurance and credit disability insurance are not required to obtain credit, and will not be provided unless I sign and agree to pay the additional cost.

Type	Premium	Term	Signatures (or Initials)
Credit Life			I want credit life insurance X _____ Name of Insured
Credit Disability			I want credit disability insurance X _____ Name of Insured
Joint Credit Life			I want joint credit life insurance X _____ Name of Insured _____ Name of Insured

I do not want: _____ Credit Life Ins.; _____ Credit Disability Ins.; _____ Joint Credit Life Ins.

Property Insurance: I may obtain property insurance from anyone I want that is acceptable to you. If I get the insurance from or through you I will pay $ _____ for _____ of coverage.

Single Interest Insurance: I may obtain single interest insurance from anyone I want that is acceptable to you. If I get the insurance from or through you I will pay $ _____ for _____ of coverage.

Itemization of Amount Financed

Amount given to me directly	$ 10,000.00	(a)
Amount paid on my account	$ _____	(b)
Amounts paid to others on my behalf:		
To Property Insurance Company	$ _____	(c)
To Credit Life Insurance Company	$ _____	(d)
To Disability Insurance Company	$ _____	(e)
To Public Officials	$ _____	(f)
_____	$ _____	(g)
_____	$ _____	(h)
Prepaid Finance Charge	$ _____	(i)
AMOUNT FINANCED (a through h - i)	$ 10,000.00	(j)
Finance Charge (include prepaid)	$ 493.15	(k)
Total of Payments (j + k)	$ 10,493.15	(l)

Security - To secure the payment of the note total (defined on the reverse side):
(1) I acknowledge and agree that you have the right to set off this note against any obligation you have (now or hereafter) to pay money to me.
(2) You may collect the proceeds (or rebates of unearned premiums) on any insurance policy insuring me (where you are named as loss payee) and obtain policy insuring the property securing this note. You will apply this toward what I owe you.

(3) ☒ If checked, this note is not further secured by any contemporaneous agreement (other than (1) and (2) of this section).

(4) ☐ If checked, this note is secured by a separate _____ dated _____

(5) ☐ **Security Agreement** - If checked, I give you a security interest in the property described below. The rights I am giving you in this property, and the obligations this agreement secures are defined on the reverse side of this form.

Assumptions - Unless specifically agreed in writing to the contrary, this security agreement and any loan it secures cannot be assumed by any person who buys the collateral described above from me, and I understand and agree that if I attempt to transfer any interest in this collateral (including, but not limited to, possession) I will be in default on all secured obligations.

This collateral will be used for personal purposes.

☐ If checked, this is a purchase money loan. You may include the name of the seller on the check or draft for this loan.

Signatures and Seals: In witness whereof, I have signed my name and affixed my seal on this 9th day of March, 1984. By doing so, I agree to the terms of this note and security agreement (including those on the reverse side of this form) and acknowledge receipt of at least one copy on today's date.

Any person who signs within this enclosure does so to give you a security interest in the property described above, but assumes no personal obligation to pay this note.

Name _____

X _____ (SEAL) Date

Disposition of Funds:

Deposited to Account Number _____ Check Number _____

CAUTION - IT IS IMPORTANT THAT YOU THOROUGHLY READ THIS CONTRACT BEFORE YOU SIGN IT.

Signature _____ (SEAL)
☐ If checked, the signature below was required as a condition of credit.

Signature Amelia F. Johnson (SEAL)
☐ If checked, the signature below was required as a condition of credit.

Signature _____ (SEAL)

SIMPLE INTEREST NOTE, DISCLOSURE, AND SECURITY AGREEMENT
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CR107

ADDITIONAL TERMS OF THE NOTE

The following terms apply to this ... whether or not it is secured by the security agreement which begins on the other side of this form (paragraph 5 in the Security section).

Definitions - "I" means each borrower who signs this note. "I" also means each other person and legal entity who by this or separate agreement promises to pay it. This includes guarantors, endorsers and sureties.

The term "note total" means the total sum agreed to be paid on this note. It includes the amount financed and the finance charge. It also includes all additional sums payable including any late payment charges, post-maturity interest, required insurance premiums, costs of collection, attorneys' fees, and costs of repossession, preservation, repairs, taxes, and sale of any property securing this note.

Applicable Law - I agree this note will be governed by the law of the state where you are located, especially the Uniform Commercial Code. The terms of any agreement securing the payment of this note may also be governed by the law of the state where the property is located.

Any term of this note (and security agreement) which does not comply with applicable law will not be effective if that law does not expressly or impliedly permit variations by agreement. If any part of this note or security agreement cannot be enforced according to its terms, this fact will not affect the balance of this note and security agreement.

Set-Off - I acknowledge and agree that you may set-off all or any part of the note total against any obligation you may have, now or hereafter to pay money to me. This includes:

(a) any deposit account balance I have with you whether time, savings, checking or NOW account, and

(b) any money owing to me on an item presented to you or in your possession for collection or exchange, and

(c) a repurchase agreement or any other non-deposit obligation.

If my right to receive money from you is also owned by some other person who has not agreed to pay this note (such as another depositor on a joint account) your right of set-off will extend to the amount of money which could be withdrawn or paid directly to me on my request or endorsement alone. In addition, (where I may obtain payment from you only with the endorsement or consent of someone who has not agreed to pay this note) your right of set-off will extend to my interest in the obligation.

Your right of set-off will not apply to an account or other obligation if it clearly appears that my rights in the obligation are solely as a fiduciary for another, or to an account which, by its nature and applicable law (for example an IRA or other tax deferred retirement account), must be exempt from the claims of creditors.

Your right of set-off may be exercised upon my default (except when prohibited by law):

(a) without prior demand or notice; and

(b) without regard to the existence or value of any property securing this note; and

(c) without regard to the number or credit-worthiness of any other persons who have agreed to pay this note.

You will not be liable for wrongful dishonor of a check or other request for payment where there is insufficient funds in the account (or other obligation) to pay such request arising as a result of your exercise of this right of set-off. I agree to hold you harmless from the claims of any person arising as the result of your exercise of this right.

Default - I will be in default on this note if any one or more of the following occurs:

(a) I fail to make a payment on this note in full when due.

(b) I fail to make a payment in full when due on any other debt I owe you.

(c) I die or am declared incompetent.

(d) I fail generally to pay my debts as they become due.

(e) I fail to keep any other promise contained in this note, any other note, any other written agreement with you, including any security agreement.

(f) any statement of fact made on an application for credit or any other written agreement with you appears to be untrue at the time it was made.

(g) any other creditor attempts, with or without legal process, to gain possession or control of any money or property of mine.

(h) I transfer a significant part of my money or property.

(i) I file for relief from my debts (or an application is filed against me for involuntary relief) under the United States Bankruptcy Code.

(j) in addition to the above, if a legal entity such as a partnership or corporation agrees to pay this note, if that entity merges, dissolves, reorganizes, terminates its business or existence, or if a partner or majority stockholder dies or is declared incompetent.

(k) if a fact appears or any event occurs which causes you to consider yourself insecure.

If an event of default occurs as to any one of us, you may exercise your remedies against any or all of us.

Remedies - If I am in default on this note, you may:

(a) accelerate the due date of the note total, making all sums immediately due.

(b) exercise your right of set-off;

(c) demand additional security or parties obligated to pay this note (or both) as a condition of waiving, for any period of time, any other remedy you may have under the law and this agreement;

(d) exercise any remedy you may have under state or federal law for collection of this note.

(e) exercise any additional right given to you under any agreement securing the payment of this note.

By electing any one or more of the remedies above, you do not waive your right to later elect any other remedy until this note is paid in full. If you do not elect any remedy upon an event of default, you do not thereby waive your right to later consider the event as a default if it continues or recurs.

Other Security - I agree that any present or future agreement securing any other debt I owe you will also secure the payment of this note.

However, an agreement securing any other debt will not secure this note if either of the following applies:

(a) you fail to make a disclosure required by law of the existence of such other security agreement, or

(b) you fail to provide (to any person entitled) any notice of right of rescission required by law for this transaction.

Obligations Independent - I understand that my obligation to pay this note is independent of the obligation of any other person who has also agreed to pay it. You may release any of us, release any security, waive any right you might have against any of us, extend new credit to any of us, renew this note, or all of the above, without affecting my obligation to pay the loan amount.

Waiver - I waive (to the extent permitted by law) certain rights I might otherwise have. These include demand, presentment, protest, notice of dishonor, and notice of protest.

Guarantee - By signing (including my seal) below I unconditionally guarantee the payment of the note total (as defined in the note). I also agree that all the other terms of the note will apply to me.

CAUTION - IT IS IMPORTANT THAT YOU THOROUGHLY READ THIS CONTRACT BEFORE YOU SIGN IT.

NAME _____

X _____ (SEAL)

NAME _____

X _____ (SEAL)

_____ (initial) I do not claim any interest in the property listed in the security agreement. However, my guarantee of payment of the note total includes any amounts agreed to be paid under the terms of the security agreement.

_____ (initial) I do claim an interest in the p... listed in the security agreement. The terms of the security a... will also apply to me.

ADDITIONAL TERMS OF SECURITY AGREEMENT

The following terms a... ply to the security agreement which begins on the front si... of this form (paragraph 5 o... the Security section).

Property - When used in this agreement, the term property means and includes:

(a) all of my property specifically listed and, if a general description is used (whether or not any specific property is listed), in all of my property fitting the general description, and,

(b) all benefits which arise from the described property, including cash or non-cash proceeds, insurance benefits, interest, dividends, stock splits, and voting rights, and,

(c) any property which is now or hereafter becomes attached to, a part of, or result from the described property.

Ownership and Duties Toward Property - By giving you this security interest, I represent and agree:

(a) I own all of the property, free of any claim by any other person, and I will defend against any other claim.

(b) The security interest I am giving you in this property has first priority over the claims of any other of my general or secured creditors. I have signed or immediately will sign any additional documents or provide you with any additional information you may require to perfect and preserve your first priority in this property. I will not hereafter do anything to defeat your position.

(c) I will keep the property in my possession (except for pledged property delivered to you), in good condition and repair, and use it only for the lawful purposes for which it was intended. Unless otherwise agreed in writing, the property will be located at my address listed on the front side of this form.

(d) I will not attempt to sell the property (unless it is inventory and identified as such), otherwise transfer any rights in this property to anyone else. I will not permit the property to become attached to any real estate without first providing you the opportunity to preserve your first priority status.

(e) I will pay all taxes and assessments on the property as they become due.

(f) I will provide you reasonable access to the property for the purpose of inspection and notify you of any loss or damage.

Insurance — I agree to purchase insurance on the property against such risks and in such amounts as you may reasonably require. In addition, I agree as follows:

(a) I will arrange for you to be named as loss payee on any such policy so that any benefits arising from the insured risks will first be paid to you for application toward the secured obligations.

(b) I agree that you may, in the event of a loss, require additional security or assurance of payment of the secured obligations as a condition of permitting any insurance benefits to be used for repair or replacement of the property.

(c) I agree to purchase insurance from a company which is authorized to do business in this state and which is reasonably acceptable to you.

(d) I will maintain this insurance until all the secured obligations are paid in full.

(e) If I fail to obtain or maintain this insurance, or I fail to arrange for you to be named loss payee, you may (but in no event are required to) purchase such insurance which will secure only your interest in the property. I agree to pay the cost of such insurance upon demand, plus interest from the date purchased at the highest contract rate permitted by law until paid in full.

Secured Obligations - This security interest will secure the payment of the note total (as defined in the note). It will also secure (except as provided in the next paragraph) any other debt I owe you now or hereafter. This security interest will survive even if there are no debts owed to you until this security interest is formally discharged in writing.

However, this security interest will not secure some other debt if a disclosure must be made with respect to such debt of the existence of this security interest and such disclosure is not given as required by law. This security interest also will not secure any other debt if any person is entitled to a notice of the right to rescind such debt unless the notice is given as provided by law.

The previous two paragraphs define what is meant by the term "secured obligation" in this agreement.

Remedies - If I am in default on any of the secured obligations you have all the remedies provided under this security agreement and by law. These remedies are in addition to any provided in the note or other obligation, and include (among others):

(a) If my default consists of failure to pay taxes, assessments or other liens, you may pay these yourself. You are not required to, however. If you do, the amount you pay will be added to the secured obligations, will be immediately due, and will accrue interest at the highest contract rate permitted by law until paid in full. (This is in addition to any other remedy you may elect.)

(b) You may require me to assemble the property and make it available to you at a place you designate which is reasonably convenient to both you and me.

(c) You may take immediate possession of the property, with or without legal process, sell it, and apply the proceeds as provided by law to your expenses and then toward the secured obligations. Expenses include your costs of repossession, attorney fees (where permitted), repairs (if necessary) and costs of sale.

(d) You will be entitled to a deficiency judgment if the proceeds of sale do not pay all the secured obligations (except where prohibited by law).

(e) You may also be entitled to keep the property in satisfaction of the secured obligations in certain circumstances.

I also agree that if any notice is required to be given to me of your intended sale or disposition of the property, notice will be considered commercially reasonable if provided by first class mail addressed to me at the address listed on the front side of this form mailed 7 days before the date of intended disposition.

Pledges - Property which is described on the other side of this form as "pledged" property which I am delivering to your possession to secure the payment of the secured obligations. You have the right to retain possession of this property until the secured obligations are paid in full. All other terms of this note and security agreement also apply to this property.

In particular (without intending to limit these provisions only to pledged property):

(a) You must use reasonable care in the custody and preservation of this property; however, you are not required to preserve any rights I may have against any prior parties to this property.

(b) I agree to pay any additional costs you incur for the custody, preservation and enforcement of any rights in this property.

(c) You may hold any increase or profits from this property as additional security, though money must be applied toward payment of the secured obligations.

(d) You may arrange for you, sel... or your nominee to be shown as owner of the pro... inform any prior party to make any payments or the proceeds directly to you, and repledge the property upon terms which do not affect my right to redeem it.

(e) The risk of accidental loss or damage is on me to the extent of any deficiency in effective insurance coverage.

(f) You are not responsible for any decline in value of the property while it remains in your possession.

Filing - A carbon, photographic or other reproduction of this security agreement may be used as a financing statement where permitted by law.

PAY TO THE ORDER OF
THE CADLE COMPANY
Without Recourse
By: _____
Insert FTC Notice if Applicable

Attorney-in-Fact for Federal Deposit Insurance Corporation in its Corporate capacity as successor in interest to
FIRST STATE BANK OF ATMORE

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